to the same right and privilege and to the additional right and privilege of engaging in the foreign trade. The principal place of business of said corporation is at Olympia, Washington, and said vessels have been, are, and will be engaged in towing for hire in and upon the waters of Puget Sound and in and upon other adjacent and connecting navigable waters of the United States and in and upon ocean and foreign waters accessible therefrom in foreign, interstate and intrastate commerce.

V

Plaintiff Cascade Tug Boat Co., Inc., is a corporation organized and existing under and by virtue of the laws of the state of Washington and has paid its license fee last [fol. 5] due. It owns and operates two Diesel tugs, one less and one more than sixty-five feet in length measured from end to end over the deck excluding sheer. Both of said tugs hold certificates of registration issued by the Federal government entitling them to engage in the foreign as well as the coasting trade of the United States. The principal place of business of said corporation is at Seattle, Washington, and said vessels are used in towing for hire in and upon Puget Sound and in and upon other navigable waters of the United States connecting therewith. Both of said vessels have towed car barges of the "Milwaukee" Railroad and have made, and are qualified to, and are capable of, making towing voyages extending beyond the territorial boundaries of the State of Washington.

VI

Plaintiff Crosby Sand & Gravel Company, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Washington and has paid its license tax last due. Said corporation owns and operates a Diesel tug exceeding sixty-five feet in length. Said tug is a registered vessel of the United States and is used in towing upon the waters of Puget Sound and other navigable waters of the United States connecting therewith and is qualified to tow and capable of towing in foreign and/or interstate.

VII

Plaintiff James Draham is a citizen and resident of the State of Washington residing at Olympia in said state. He

owns and operates two Diesel tugs, each of which is under sixty-five feet in length measured from end to end along the deck excluding sheer. One of said vessels holds a certificate of enrollment from the Federal government granting it [fol. 6] the privilege of engaging in the coasting trade of the United States. The other holds a certificate of registration from the Federal government entitling it to the like privilege and to the additional privilege of engaging in the foreign trade. Both of said vessels have been, are and will be used in towing for hire in and upon the waters of Puget Sound and in and upon other navigable waters of the United States adjacent to and connecting therewith and may be used in and upon foreign waters accessible therefrom in the carrying in of foreign, interstate and intrastate commerce.

VIII

Plaintiff Foss Launch & Tug Co., Inc., is a corporation organized and existing under and by virtue of the laws of the state of Washington and has paid its annual license fee last due. It owns and operates fifteen Diesel tugs, seven of which are more, and eight less, than sixty-five feet in length when measured from end to end over the deck excluding sheer. All of said vessels hold certificates of registration issued by the Federal government granting them the right and privilege of engaging in both the foreign and coasting trade of the United States. The principal place of business of said corporation is at Tacoma, Washington, and its said vessels have been, are and will be used in towing for hire in and upon the waters of Puget Sound and in and upon other navigable waters of the United States adjacent thereto and connecting therewith and in and upon ocean and foreign waters accessible therefrom in foreign, interstate and intrastate commerce.

IX

Plaintiff, O. D. Houchan is a citizen and resident of the State of Washington residing in Seattle in said state and [fol. 7] owns and operates a Diesel tug less than sixty-five feet in length measured from end to end over the deck excluding sheer. Said tug holds a certificate of enrollment from the Federal government granting it the right and privilege of engaging in the coasting trade of the United

States and has been and is being used by said plaintiff in towing for hire in and upon the waters of Puget Sound and in and upon other navigable waters of the United States adjacent and connecting therewith in both interstate and intrastate commerce and is eligible for registration and capable of towing between ports in the state of Washington and ports in British Columbia.

X

Plaintiff Johnson Tug & Barge Company, Inc., is a corporation organized and existing under and by virtue of the laws of the state of Washington and has paid its annual license fee last due. It owns and operates four Diesel tugs, all under sixty-five feet in length when measured from end to end over the deck exclusive of sheer. All of said tugs hold certificates of registration issued by the Federal government granting them the right and privilege of engaging in the coasting trade of the United States and also in foreign trade. The principal place of business of said corporation is at Port Angeles, Washington, and its said vessels have been and will be used in towing for hire in and upon the waters of the Straits of San Juan De Fuca and in and upon other adjacent and connecting navigable waters of the United States and in and upon ocean and foreign waters accessible therefrom, in foreign, interstate and intrastate commerce.

XI

Plaintiffs John W. McEwan and Allen McEwan constitute a partnership engaged in the towing business under [fol. 8] the name of McEwan Brothers. Said partnership owns and operates a Diesel tug less than sixty-five feet in length measured from end to end over the deck excluding sheer. Said vessels holds a certificate of registration issued by the Federal government entitling her to engage in the foreign as well as the coasting trade of the United States. The office of said partnership is at Seattle, Washington, and said vessel is employed in towing for hire in and upon the waters of Puget Sound and in and upon navigable waters of the United States connecting therewith. Said vessel has made towing voyages extending beyond the boundaries of the State of Washington and holds herself in readiness to again do so when and if opportunity offers.

XII

Plaintiff Merrill & Ring Lumber Co., Inc., is a corporation organized and existing under and by virtue of the laws of the state of Washington and has paid its license fee last due. It owns and operates two steam tugs more than forty feet in length and two Diesel tugs less than sixty-five feet in length measured over the deck from end to end excluding sheer. All of said vessels hold certificates of registration issued by the Federal government entitling them to engage in both the foreign and coasting trade of the United States. The principal place of business of said corporation is in Seattle, Washington; and said tugs have from time to time been used, and are being used, and will be used, to tow in and upon the waters of Puget Sound and in and upon other navigable waters of the United States connecting therewith and in and upon ocean and foreign waters accessible therefrom in foreign, interstate and intrastate trade.

XIII

Plaintiff Nemah River Towboat Company, Inc., is a cor-
[fol. 9] poration organized and existing under and by virtue of the laws of the State of Washington and has paid its license fee last due. Said corporation owns and operates a Diesel tug less than sixty-five feet in length measured from end to end over the deck excluding sheer. Said vessel holds a certificate of enrollment issued by the Federal government granting her the privilege of engaging in the coasting trade of the United States. The principal place of business of said corporation is at Raymond, Washington, and said vessel is used in towing for hire in and upon the waters of the Nemah River, Willapa Harbor, and other navigable waters of the United States connecting therewith.

XIV

Plaintiff Northwestern Logging Company is a corporation organized and existing under and by virtue of the laws of the state of Washington and has paid its license tax last due. Said corporation owns and operates in and upon the waters of Grays Harbor and in and upon other navigable waters of the United States connected therewith a Diesel tug less than sixty-five feet in length measured from end to end over the deck excluding sheer. Said vessel holds

a certificate of enrollment issued by the Federal government granting it the privilege of engaging in the coasting trade of the United States and is capable of engaging in offshore work or towing between ports in the state of Washington and ports in British Columbia.

XV

Plaintiffs John Olson and Ed M. Olson are citizens and residents of the United States and of the State of Washington and are engaged in the towing business under the name of Olson Tug Boat Company, which name they have filed in the office of the clerk of Pierce County, Washington. [fol. 10] Said Olson Tug Boat Company operates a steam tug more than forty feet in length and three Diesel tugs, one of which is more and two less than sixty-five feet in length measured from end to end over the deck excluding sheer. Two of said Diesel tugs hold certificates of enrollment issued by the Federal government granting them the privilege of engaging in the coasting trade of the United States and said steam tug and one of said Diesel tugs are registered and have the additional right to engage in foreign trade. The headquarters of said company are at Tacoma, Washington, and said vessels are used in towing for hire in and upon the waters of Puget Sound and in and upon navigable waters of the United States connecting therewith. Two of said vessels are are capable of and have made towing voyages extending beyond the territorial boundaries of the state of Washington.

XVI

Plaintiff Olympia Towing Company, Inc., is a corporation organized and existing under and by virtue of the laws of the state of Washington and has paid its license tax last due. It owns and operates two Diesel tugs both under sixty five feet in length measured from end to end over the deck excluding sheer. One of said vessels holds a license from the Federal government to engage in the coasting trade and the other holds a certificate of registration issued by the Federal Government entitling her to engage in the foreign as well as the coasting trade of the United States. The principal place of business of said corporation is in Olympia, Washington, and said vessels are used in

towing for hire in and upon the waters of Puget Sound and in and upon other navigable waters of the United States connecting therewith.

[fol. 11]

XVII

Plaintiff, Pioneer Towing Co., Inc., is a corporation organized and existing under and by virtue of the laws of the state of Washington and has paid its annual license fee last due. It owns and operates three Diesel tugs, all of which are less than sixty-five feet in length measured from end to end over the deck excluding sheer. Two of said tugs hold certificates of enrollment issued by the Federal government granting them the right and privilege to engage in the coasting trade of the United States and the third holds a certificate of registration entitling her to the same right and privilege and the additional right and privilege of engaging in foreign trade. The principal place of business of said corporation is in Seattle, Washington, and said vessels have been, are and will be used in towing for hire in and upon the waters of Puget Sound and in and upon adjacent and connecting navigable waters of the United States and in and upon ocean and foreign waters accessible therefrom in foreign interstate and intrastate commerce.

XVIII

Plaintiff Pioneer Transport Company is a corporation organized and existing under and by virtue of the laws of the state of Washington and has paid its license fees last due. It owns and operates three Diesel tugs, two of which are more and one less than sixty-five feet in length measured from end to end over the deck excluding sheer. All three of said vessels hold certificates of registration issued by the Federal government entitling them to engage in the foreign as well as the coasting trade of the United States. The principal place of business of said corporation is in Seattle, Washington, and said vessels have been, are, and will be engaged in towing in and upon the waters of Puget [fol. 12] Sound and in and upon other adjacent and connecting navigable waters of the United States and are qualified and capable of towing foreign and/or interstate should opportunity offer.

XIX

Plaintiff Puget Sound Tug & Barge Co., Inc., is a corporation organized and existing under and by virtue of the laws of the State of Washington and has paid its annual license fee last due. It owns and/or operates six steam and twenty-three Diesel tugs. All of said steam tugs exceed forty feet in length. Of the Diesel tugs four exceed sixty-five feet in length when measured over the deck from end to end excluding sheer, and nineteen are less than sixty-five feet in length when so measured. Twelve of said Diesel and one of said steam tugs hold certificates of enrollment issued by the Federal government granting them the right and privilege of engaging in the coasting trade of the United States and five of said steam tugs and eleven of said Diesel tugs hold certificates of registration issued by the Federal government entitling them by law to the same right and privilege and to the additional right and privilege of engaging in the foreign trade. The principal place of business of said corporation is in Seattle, Washington, and said vessels have been, are and will be engaged in towing for hire in and upon the waters of Puget Sound and in and upon other adjacent and connecting navigable waters of the United States and in and upon ocean and foreign waters accessible therefrom in foreign, interstate and intrastate commerce.

XX

Plaintiff Schafer Bros. Lumber & Shingle Company is a corporation organized and existing under and by virtue of the laws of the state of Washington and has paid its li- [fol. 13] cense tax last due. Said corporation owns and operates one steam tug more than forty feet in length and two Diesel tugs each more than sixty-five feet in length measured from end to end over the deck excluding sheer. All of said tugs hold certificates of enrollment issued by the government of the United States granting to them the privilege of engaging in the coasting trade of the United States. The principal place of business of said corporation is at Montesano, Washington, and said tugs have been, are, and will be used in towing in and upon the waters of Grays Harbor and in and upon other navigable waters of the United States connecting therewith. Some of them have towed interstate and all of them are capable of so doing.

XXI

Plaintiff Shively Tow Boat Company, Inc., is a corporation organized and existing under and by virtue of the laws of the state of Washington and has paid its license fees last due. Said corporation owns and operates four Diesel tugs, one more and three less than sixty-five feet in length measured from end to end over the deck excluding sheer. All of said vessels hold certificates of registration issued by the Federal government entitling them to engage in the foreign as well as the coasting trade of the United States. The principal place of business of said corporation is in Seattle, Washington, and said vessels have been, are, and will be used in towing for hire in and upon the waters of Puget Sound and in and upon the navigable waters of the United States connecting therewith. All of them have rendered towing service to vessels engaged in interstate commerce and some of them have made towing voyages beyond the territorial boundaries of the State of Washington.

[fol. 14]

Plaintiff Delta V. Smith is a citizen and resident of the United States and of the State of Washington residing at Olympia in said State. He owns and operates one steam tug over forty feet in length and six Diesel tugs, two of which are more than, and four less than sixty-five feet in length measured from end to end over the deck excluding sheer. Said steam tug and two of said Diesel tugs hold certificates of enrollment issued by the Federal government granting them the privilege of engaging in the coasting trade and four of said Diesel tugs hold certificates of registration issued by the Federal government entitling them to the same privilege and to the additional privilege of engaging in the foreign trade. Said plaintiff's headquarters are at Olympia, Washington, and his said vessels have been, are, and will be operated for hire in and upon the waters of Puget Sound and in and upon other navigable waters of the United States adjacent to and connecting therewith in both interstate and intrastate commerce and four of them have made towing voyages to ports outside the state of Washington.

XXIII

Plaintiff Sunset Tug & Barge Co. is a corporation organized and existing under and by virtue of the laws of the State of Washington and has paid its license tax last due. It owns and operates two Diesel tugs both less than sixty-five feet in length measured from end to end over the deck excluding sheer. Both of said vessels are registered and entitled to all the rights and privileges of registered vessels of the United States. They are used in towing for hire in and upon the waters of Puget Sound and other navigable waters connected therewith. Both are qualified to and capable of towing between ports in the state of Washington and ports of British Columbia.

[fol. 15]

XXIV

Plaintiff Tacoma Tug & Barge Co., Inc., is a corporation organized and existing under and by virtue of the laws of the state of Washington and has paid its license fee last due. It owns and operates five Diesel tugs, two of which are more and three less than sixty-five feet in length measured from end to end over the deck excluding sheer. Three of said vessels hold certificates of enrollment issued by the Federal government granting them the right to engage in the coasting trade of the United States and the other two hold certificates of registration issued by the Federal government entitling them to the same right and privilege and the additional right of engaging in the foreign trade. The principal place of business of said corporation is in Tacoma and said vessels have been, are, and will be engaged in towing for hire in and upon the waters of Puget Sound and in and upon adjacent and connecting navigable waters of the United States and are capable of towing in and upon ocean and foreign waters accessible therefrom and engaging in foreign as well as interstate and intrastate commerce.

XXV

Plaintiff Fred W. Thurber is a citizen and resident of the United States and the state of Washington residing in Hoquiam, Washington, and owns and operates a Diesel tug under sixty-five feet in length measured end to end over the deck excluding sheer. Said vessel holds a certificate of registration issued by the Federal government en-

titling her to engage in both the foreign and coasting trade of the United States and is used in towing for hire in and upon the waters of Grays Harbor and in and upon other navigable waters of the United States connecting therewith.

[fol. 16] XXVI

Plaintiff Transit Towboat Company, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Washington and has paid its license tax last due. Said corporation owns and operates a Diesel tug less than sixty-five feet in length measured from end to end over the deck excluding sheer. Said tug holds a certificate of enrollment issued by the Federal government granting it the privilege of engaging in the coasting trade of the United States. The principal place of business of said corporation is at Raymond, Washington, and said tug is used in towing for hire in and upon the waters of Willapa Harbor, and other navigable waters of the United States adjacent thereto and connecting therewith and in and upon ocean waters accessible therefrom.

XXVII

Plaintiff R. J. Ultican Tugboat Co., Inc., is a corporation organized and existing under and by virtue of the laws of the State of Washington and has paid its license fee last due. It owns and operates three Diesel tugs all under sixty-five feet in length and all holding certificates of enrollment issued by the Federal government granting them the right to engage in the coasting trade of the United States. The principal place of business of said corporation is in Aberdeen, Washington, and said vessels have been, are, and will be used in towing for hire in and upon the waters of Grays Harbor and in and upon other navigable waters of the United States adjacent and connecting therewith and two of them have towed interstate and hold themselves in readiness to do so should opportunity offer.

[fol. 17] XXVIII

Plaintiff Wagner Tug Boat Company is a corporation organized and existing under and by virtue of the laws of the state of Washington and has paid its license fee last due. Said corporation owns and operates a steam tug

more than forty feet in length and four Diesel tugs, two of which are less than and two more than sixty-five feet in length measured from end to end over the deck excluding sheer. Said steam tug holds a certificate of enrollment issued by the Federal government granting her the privilege of engaging in the coasting trade, and all four of such Diesel tugs hold certificates of registration entitling them to the same privilege and to the additional privilege of engaging in foreign trade. The principal place of business of said corporation is in Seattle, Washington, and said vessels are used in towing for hire in and upon the waters of Puget Sound and in and upon other navigable waters of the United States adjacent thereto and connecting therewith. All of said vessels are capable of towing between Washington and British Columbia ports and three of them have towed on voyages extending beyond the borders of the state of Washington and all of them hold themselves ready to do so when and if opportunity offers.

XXIX

Plaintiff Clifford W. Waterman, doing business as the Waterman Towing Co., is a citizen and resident of the United States and of the State of Washington residing at Seattle, Washington. Said plaintiff owns and operates three Diesel tugs in towing for hire in and upon the waters of Puget Sound and in and upon navigable waters of the United States connecting therewith and in foreign waters accessible therefrom. Said vessels are under sixty-five feet in length measured from end to end over the deck excluding sheer and all of them hold certificates of registration issued by the Federal government entitling them to engage in both the foreign and coasting trade of the United States.

[fol. 18] XXX

Plaintiff Knappton Towboat Co. is a corporation organized and existing under and by virtue of the laws of the State of Washington and has paid its license fee last due. It operates several tow boats regularly documented as vessels of the United States upon the navigable waters of the United States particularly the Columbia River and other waters connecting therewith. Said vessels are largely used in interstate towing between ports in Washington and ports in Oregon.

XXXI

Plaintiff Shaver Transport Co. is a corporation organized and existing under and by virtue of the laws of Oregon. It owns a number of towboats holding Government documents and licenses entitling them to navigate upon the navigable waters of the United States. Its principal place of business is at Portland, Oregon, and its vessels are largely used in towing across the Columbia River between ports situated in Washington and ports situated in Oregon.

XXXII

The Defendant, E. Pat Kelly, is the duly constituted appointed and acting Director of the Department of Labor and Industries, an administrative department of the government of the state of Washington. Defendant Jay Olinger is the Supervisor of the Division of Safety of said Department and the defendant Howell Parker has been appointed as and is acting as a deputy of said Director of the Department of Labor and Industries under the designation, "Marine Inspector".

[fol. 19]

XXXIII

The Legislature of the state of Washington in its 1907 Session passed, and the then Governor of said State approved, an act which became Chapter 200 of the Laws of 1907. The title to said act is as follows:

"An Act regulating steam vessels, and vessels or boats operated by machinery, navigating the waters within the jurisdiction of this state, excepting vessels which are subject to inspection under the laws of the United States, and providing penalties for the violation thereof."

Said act confers upon the Commissioner of Labor (now the Director of the Department of Labor and Industries) broad and extensive regulatory powers over certain classes of vessels therein described navigating in and upon navigable waters within the exclusive jurisdiction of the state of Washington, that is to say, upon internal landlocked waters of the state as distinguished from other waters therein which through their connection with other waters are capable of being used as highways for interstate and

foreign commerce, being a part of the waters usually referred to as navigable waters of the United States.

XXXIV

The defendants, however, have erroneously construed the said act to give the Director of the Department of Labor and Industries the power and to make it his duty through his co-defendants and other deputies and agents to license and regulate under and by virtue of the act each and every vessel of the classes named in the act which at any time may be found navigating in and upon any waters within the territorial boundaries of the state of Washington except only those vessels which are inspected by the Steamboat Inspectors of the United States and said Director is proceeding to apply the act to the vessels of these plaintiffs generally described in paragraphs I to XXXI inclusive [fol. 20] of this complaint, all of which are vessels of the United States and navigating solely in and upon the navigable waters of the United States, and said Director of the Department of Labor and Industries has threatened to, and unless he is prohibited or restrained he will, through his co-defendants, acting unlawfully and in excess of his jurisdiction, proceed to do among other things the following:

(1) Cause the prosecution of these plaintiffs and all other owners of such vessels found navigating in and upon waters within the territorial boundaries of the state of Washington unless they observe and obey Section 9 of said Chapter 200, Laws of 1907, as is evidenced by his having caused to be prepared and circulated throughout the sea ports of the state a placard approved by the State Department of Efficiency reading as follows:

"Navigators Take Notice!

(Secs. 9 and 21, Chap. 200, Laws 1907)

It is unlawful to navigate the waters of the State of Washington between Sunset and Sunrise without proper Signal Lights.

For Every Infraction of this Law a Fine of Two Hundred and Fifty Dollars $250.00 shall be Forfeited to the State.

(Includes Private Power Boats.)

Department of Labor and Industries, Safety Division."

(2) To institute suits for penalties under the act against these plaintiffs and all other vessel owners who navigate vessels (not subject to inspection by the United States Steamboat Inspectors) in or upon any waters lying within the boundaries of the state of Washington unless they will among other things:

[fol. 21] (a) Submit said vessels to inspection, annually or oftener if he shall deem it reasonable, by the defendant Parker and/or other inspectors appointed by said Director at a cost to said owners of not less than five nor more than twenty dollars for each inspection.

(b) Make such changes, repairs and improvements as said Director may thereupon require.

(c) Carry such officers on said vessels as he shall after examination license as masters, pilots and engineers.

(d) Carry such crews as he shall deem necessary to manage each vessel with safety.

(e) Carry such life saving equipment as he shall require and approve.

(f) Carry such fire prevention apparatus as he shall require and approve.

(g) Keep on board at all times a copy of a license to be issued by him authorizing the vessel to navigate in and upon waters within the state, the same to be posted in a conspicuous place.

(h) Keep a copy of the first twenty-two sections of the act posted in a conspicuous place on said vessel.

(i) Keep two copies of the navigation rules set out in section 8 of the Act posted in the vessel, one in the pilot house, the other in a conspicuous place.

(j) Keep the vessel's name painted on her stern in the character and colors prescribed by Section 16 of the Act.

[fol. 22] (k) Comply with "all orders, regulations and requirements of the Commissioner" (Sec. 25); that is to say, of the defendant Director of the Department of Labor and Industries and his co-defendants, the Act providing in Section 28 thereof that any inspector employed by the

Commissioner (now Director of the Department of Labor and Industries) "may perform any act and exercise any authority herein prescribed for the Commissioner of Labor."

XXXV

Plaintiffs allege that the power to enact laws governing, regulating and controlling navigation in and upon the navigable waters of the United States is by the Constitution of the United States lodged exclusively in the Congress of the United States by the provisions of section 8 of Article I of said Constitution and section 2 of Article III thereof, and that said power has, since the foundation of the Federal government, been freely and widely and comprehensively exercised. That each and every one of the vessels of the plaintiffs generally described in paragraphs I to XXXI, inclusive, in this complaint, since they navigate only in and upon navigable waters of the United States are at all times subject to the paramount laws of the United States governing said navigation, and among others to laws prescribing:

(1) The character, color, sizes and arrangement of all lights which each of them shall carry and display under minutely specified circumstances,

(2) The manner and form in which sailing, steering and pilot rules prescribed by Congress and/or other duly authorized agencies of the United States shall be posted in said vessels.

[fol. 23] And to the end that navigation in and upon the navigable waters of the United States may be carried on with safety to passengers and crews, etc., Congress has enacted many laws, all of which are applicable to the vessels of the plaintiffs and providing among other things:

(a) That the master or owner of any such vessel must make a report to the Collector of Customs within five days if said vessel receives any accidental injury affecting her seaworthiness.

(b) That if any person knowingly sends a vessel to sea in the foreign or coastwise trade in such an unseaworthy state that the life of any person is likely to be endangered he shall be subject to a fine of not more than $1000.00 or to imprisonment not to exceed five years, or both.

(c) The exact number and specific kind of life preservers, ring buoys, and other like apparatus which must be carried to insure safety of her crew.

(d) The character and number of fire exteinguishers or other fire fighting and prevention apparatus that such vessels must carry when so navigating.

(e) What vessels shall carry and what vessels shall not be required to carry licensed officers.

(f) The kind and character of signaling equipment; i.e., whistles, bells, etc., that each vessel shall carry.

together with a multitude of other regulations concerning speed in fog, and in channels, special lights when towing, passing signals, etc. too numerous to mention but all readily found in federal statutes covering shipping and navigation or in the multifarious rules and regulations made pursuant thereto and having the force of law.

[fol. 24] XXXVI

That all vessels (including each and every vessel owned and/or operated by these plaintiffs) when operating upon any navigable waters within the boundaries of the United States and/or within four leagues of the coasts thereof are subject to boarding and inspection by any officer or officers of the government of the United States whom the Secretary of Commerce of the United States may designate to determine whether they are complying with the acts of Congress and the regulations made in pursuance thereof covering navigation and particularly those regulations designed to promote safety, and said vessels are particularly made subject to boarding and inspection by the officers and inspectors of the Bureau of Navigation and Steamboat Inspection Service and by all Coast Guard Officers and Coast Guard vessels and by all United States Custom officers whether within or without their respective districts. Said Bureau of Navigation and Steamboat Inspection Service maintains five patrol vessels whose chief function is to enforce the Motor Boat acts of the United States and these vessels during the fiscal year ending June 30, 1933, boarded and inspected 32,003 vessels. During the same period the Coast Guard inspected upwards of 200,000 vessels. That there are within the Seattle United States

Custom Collection District—which includes only a part of the state of Washington, a portion of the North Bank of the Columbia River being within the Oregon district—about three hundred United States Customs Inspectors and approximately twenty-five Coast Guard vessels and many officers and inspectors of the Bureau of Navigation and Steamboat Inspection, the exact number of which the plaintiffs are unable to state, all authorized under the laws of the United States to board and inspect any vessel navigating in or upon the navigable waters of the United States within the state of Washington or within four leagues of its coast. Plaintiffs are unable to state how many inspections are made but allege that said inspectors and inspection agencies are at all times assiduous and active.

[fol. 25]

XXXVII

That the defendants have for more than one year last past been attempting to and proceeding to enforce the provisions of said Chapter 200 of the Laws of 1907 against these plaintiffs, their vessels and employees, and plaintiffs have been informed and believe and therefore allege that they have been intimidating the officers of plaintiffs' vessels by threatening that if they continue to serve as masters, pilots or engineers thereon without submitting to examination by the said Director of the Department of Labor and Industries and securing a license from him that they will be fined fifty dollars for each day they so act, and plaintiffs further allege upon information and belief that defendants and each of them have actually issued over their signatures documents purporting to give certain individuals the right to act as masters, pilots and engineers on vessels navigating the waters of Puget Sound.

XXXVIII

That within a month last past the defendants have issued a circular letter which has been received by all of these plaintiffs, except those resident in Oregon, written upon the letterhead of the Department of Labor and Industries and signed by defendant E. Pat Kelly, as Director thereof, and by defendant Jay Olinger, as Supervisor of Safety, which letter reads as follows:

"Effective immediately, the State will proceed to inspect vessels in Washington waters as per the State Navigation Law R & B 9843-70.

Inspections made and fees collected prior to January 1st, 1935, will apply on the 1935 licenses."

That oral demands have since been made upon a number of plaintiffs to submit their vessels to inspection and such demands refused. That a number of plaintiffs who thus refused received on November 30, 1934, and on December 1, 1934, letters written on the letterhead of the Department of Labor and Industries and signed by the defendant Parker [fol. 26] as "Marine Inspector" reading as follows:

"As you have refused to comply with State of Washington Navigation Laws, Chapter 200 R & B 9843-70, I hereby notify you not to operate your tugboats without first having same inspected by the State Marine Inspector and receiving a certificate of inspection for your boats.

For non-compliance of this order, a quotation in part, from the state navigation laws, Sec. 9867, provides:

"* * * the owners and masters shall forfeit to the state of Washington the penalties prescribed in this act, and the vessel so navigated shall also be liable therefor, and may be attached and proceeded against in any court having jurisdiction. * * *"

XXXIX

That unless the defendants are restrained and prohibited by this court the plaintiffs will be compelled to make immediate choice between three possible courses of action, to-wit:

(1) To cease operating their vessels, or

(2) To submit to the demands of the defendants, or

(3) Suffer prosecution for the monetary penalties provided in Chapter 200 of the Washington Laws of 1907.

And in any event, and whichever choice they may make, the plaintiffs will necessarily suffer irreparable losses and damages for which they have no remedy at law.

XL

Plaintiffs allege that the defendants, in attempting to enforce said Chapter 200 of the Washington Laws of 1907, with respect to their vessels which operate only in and upon navigable waters of the United States, are acting in excess of any jurisdiction given them by law and that they are in so doing exercising and attempting to exercise powers rightfully belonging to and which are already being exercised by various officers and agencies of the Federal [fol. 27] government in whom said powers are exclusively vested by the Constitution of the United States and by the laws and treaties made in pursuance thereof, and further allege that if the defendants are permitted to continue in said course that these plaintiffs and each of them will be deprived of valuable rights guaranteed to them by the Constitution of the United States and the navigation laws made pursuant thereto, and plaintiffs further allege that unless the defendants are prohibited or in some way enjoined that they, the plaintiffs, will be at once and immediately be deprived of property without due process of law and denied the equal protection of the laws within the intent and meaning of the 14th amendment to the Constitution of the United States.

Wherefore, the plaintiffs petition and pray this Honorable Court upon the filing of this petition duly verified to issue an order commanding the defendants, and each of them, from the time of the service thereof to desist and refrain until the further order of the court from enforcing or attempting to enforce against the plaintiffs or their said vessels any of the provisions of Chapter 200 of the Washington Laws of 1907, (Rem. Comp. Stat. sections 9843-70) and that said order command said defendants to appear before the court at a time and place to be fixed in said order to show cause why they should not be required to desist and refrain from enforcing said act during the pendency of this proceeding and until the court shall have had opportunity in due course to try and investigate the matter on its merits.

Plaintiffs further pray that when a trial shall have been had on the merits that the restraint and prohibition of said order may be made permanent and that they may be awarded their costs and disbursements herein and such

other and further relief as the court may deem just and equitable.

John S. Robinson, 602 Central Building, Seattle, Washington, Attorney for Plaintiffs.

[fol. 28] *Duly sworn to by Wedell Foss. Jurat omitted in printing.*

[fol. 29] IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

ORDER GRANTING TEMPORARY WRIT OF PROHIBITION, ETC.—Filed December 3, 1934

The court having examined the petition of the plaintiffs duly verified upon oath and filed in the above entitled matter, and having examined Chapter 200 of the 1907 Laws of Washington, and having examined a certain placard and two certain letters exhibited by John S. Robinson, attorney for plaintiffs, and purporting to be the originals of the placard pleaded in paragraph XXXIV of said petition and of the two letters quoted in paragraph XXXVIII thereof, and having duly considered the whole matter, Now Therefore, in accordance with the prayer of said petition, it is

Ordered, Adjudged and Decreed that you, the defendant E. Pat Kelly, as Director of the Department of Labor and Industries of the state of Washington, and you, the defendant Jay Olinger, as Supervisor of the Safety Division of said Department, and you, the defendant Howell Parker, as a deputy of said Director under the title Marine Inspector, be, and you hereby are, commanded from the time of the service of this writ upon you, to desist and refrain until the further order of this court from attempting to enforce [fol. 30] the provisions of Chapter 200 of the 1907 Laws of the State of Washington against the plaintiffs herein, namely the Foss Company, Inc., a corporation, Allman-Hubble Tugboat Company, Inc., a corporation, Bellingham Tug & Barge Co., Inc. a corporation, Capital City Tug Co. Inc., a corporation, Cascade Tug Boat Co. Inc., a corporation, Crosby Sand & Gravel Company, Inc., a corporation, James Drahm, Foss Launch & Tug Co. Inc., a corporation, O. D. Houchan, Johnson Tug & Barge Company, Inc., a corporation, John W. and Allen McEwan, doing

business as McEwan Brothers, Merrill & Ring Lumber Co., Inc., a corporation, Nemah River Towboat Company, Inc., a corporation, Northwestern Logging Company, a corporation, John Olson and Ed M. Olson, doing business as Olson Tug Boat Company, Olympia Towing Company, Inc., a corporation, Pioneer Towing Co., Inc., a corporation, Pioneer Transport Company, a corporation, Puget Sound Tug & Barge Co. Inc., a corporation, Schafer Bros. Lumber & Shingle Company, a corporation, Shively Tow Boat Company, Inc., a corporation, Delta V. Smith, Sunset Tug & Barge Co., a corporation, Tacoma Tug & Barge Co., Inc., a corporation, Fred W. Thruber, Transit Towboat Company, Inc., a corporation, R. J. Ultican Tugboat Co., Inc., a corporation, Wagner Tug Boat Company a corporation, Clifford W. Waterman, doing business as Waterman Towing Co., Knappton Towboat Co., a corporation, and Shaver Transport Co., a corporation, or against any of the tug boats owned or operated by any of said plaintiffs so long as the operation of said vessels is confined to the navigable waters of the United States as distinguished from land-locked waters lying wholly within the boundaries of the state of Washington and not connected with waters capable of being used as continuous highways for the carrying on of interstate or foreign commerce by water.

It is Further Ordered, Adjudged and Decreed that you, and each of you, be and you hereby are, ordered and directed to appear before this court on the 17th day of December, 1934, at ten o'clock A. M., to show cause, if any you have, why the restraints and prohibitions of this order should not be continued in full force and effect pendente lite and until the court shall have had full opportunity to try and investigate this matter to determine whether or not you should not be absolutely and permanently restrained [fol. 31] from further proceeding to enforce the provisions of said Chapter 200 of the Washington Laws of 1907 against said plaintiffs and/or their vessels as prayed for in said petition.

Done in open court this 3d day of December, 1934.

D. F. Wright, Judge.

Presented by: John S. Robinson, 602 Central Building, Seattle, Washington.

[File endorsement omitted.]

[fol. 32] IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

ORDER GRANTING LEAVE TO APPEAR AS AMICUS CURIÆ—Filed December 17, 1934

The above entitled matter coming on for hearing on motion of Kenneth Durham for leave to appear herein as Amicus Curiae and present briefs and *and* arguments, and it appearing to the satisfaction of the court that the issues involved in the above action are of great public interest and that said Amicus Curiæ represents clients whose safety is affected by said litigation, and being fully advised in the premises, it is by the court,

Ordered that said motion be hereby granted and that said Kenneth Durham be, and he is hereby given leave to appear herein and present briefs and arguments.

Done in open court this 14 day of December, 1934.

D. F. Wright, Judge.

Presented by: Kenneth Durham.

[File endorsement omitted.]

[fol. 33] IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

ORDER CONTINUING WRIT OF PROHIBITION, ETC.—Filed December 17, 1934

This matter coming on before me on the 17th day of December, A. D. 1934, on the order to show cause made and entered in said case on the 3rd day of December, 1934, plaintiffs appearing by their attorney, John S. Robinson, and the defendants not appearing, it is hereby

Ordered that the said writ of prohibition made and entered in this cause on December 3, 1934, be in accordance with the prayer of the complaint, be continued in full force and effect during the pendency of this proceeding, and until the matter shall, in some way, have been disposed of upon the merits.

Done in open Court this 17th day of December, A. D., 1934.

D. F. Wright, Judge.

[File endorsement omitted.]

[fol. 34] [File endorsement omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

DEMURRER—Filed December 17, 1934

Comes now the defendant above named by G. W. Hamilton, attorney general, and W. A. Toner, assistant attorney general, and demurs to the complaint of the plaintiff and for grounds and reasons for demurrer, assign the following:

I

That there is a defect of parties plaintiff.

II

That several causes of action have been improperly united.

III

That the complaint does not state facts sufficient to constitute a cause of action.

IV

That the court has no jurisdiction over the subject matter of the action.

V

That the plaintiff has no legal capacity to sue.

Respectfully submitted, G. W. Hamilton, Attorney [fol. 35] General; W. A. Toner, Assistant Attorney General, Attorneys for Defendants.

[fol. 36] IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

ANSWER—Filed March 27, 1935

Now come the defendants and, without waiving the demurrer heretofore interposed, make answer to the petition of plaintiffs as follows:

I

For answer to paragraphs I to XXXI of the petition, these answering defendants say that they have no knowledge or information concerning the matters therein contained sufficient to form a belief as to the truth or falsity of the said allegations, and that therefore they deny the same and each and every allegation therein contained.

II

For answer to paragraph XXXIV of the petition, the defendants deny that they have in any manner erroneously construed chapter 200 of the Session Laws of 1907 of the state of Washington, and deny that they have attempted to exercise jurisdiction over vessels generally, the inspection of which is by law delegated or assumed by the United States; admits that the director intends to apply the act to the [fol. 37] vessels of the plaintiffs generally described in the petition; and alleges that said vessels navigate largely between ports in the state of Washington and within the territorial boundaries of the state of Washington; that as to vessels operated by steam and not over a certain length and tonnage, and as to other vessels operated by machinery, these defendants proposed to apply the act of 1907 heretofore referred to and the rules and regulations of the director based thereon; admits that the defendants circulated the placard mentioned in subdivision (1) of said paragraph XXXIV, and alleges that it is the duty of each both of the class hereinafter referred to to comply with such regulations. The defendants further admit that they have promulgated certain regulations similar to those contained in subdivision (2) of paragraph XXXIV and that such regulations, in so far as they are consistent with regulations made by the United States, are reasonable

and proper and are in accordance with the act, and that, as to such of said regulations as are covered by federal statutes, they neither have in the past nor do they intend in the future to attempt to enforce any such provision or regulation which conflicts with a regulation lawfully established under and by virtue of the laws of the United States of America.

III

For answer to paragraph XXXV these defendants deny the said paragraph and each and every allegation, matter and thing therein contained, except that this defendant admits that certain regulations promulgated by the United States are controlling with reference to the navigation of boats described in the acts of the national Congress to which said rules are applicable; that certain regulations of the United States apply to all vessels with reference to life saving apparatus, fire prevention apparatus, signalling and lights.

[fol. 38] IV

For answer to paragraph XXXVI of the petition, the defendants deny each and every allegation therein contained, except that the defendants admit that certain acts of Congress and regulations made pursuant thereto authorize inspection of certain of the plaintiffs' boats by various inspectors, and allege that the inspection service conducted and proposed to be conducted by the defendants is not in conflict with any of the inspection services authorized by the United States or its Bureau of Navigation and steamboat inspection service.

V

For answer to paragraph XXXVII of the petition, the defendants admit that they have been attempting and proceeding to enforce the provisions of said chapter 200 of the Laws of 1907 against such of the plaintiffs, their boats and their employees, as are permitted to this state under the laws of the United States; and, while they deny that they have intimidated the officers of the plaintiffs' vessels, admit that they have required the masters, pilots, or engineers to be examined as to their qualifications and have

demanded that they secure licenses to act as such masters, pilots or engineers on vessels navigating the waters within the territorial limits of the State of Washington and particularly the waters of Puget Sound, so far as said waters are inland waters as defined by the Laws of the United States.

VI

For answer to paragraph XXXVIII, defendants admit that they have issued a circular letter as therein set forth and that they wrote to a number of the plaintiffs in the latter part of November, 1934, substantially as alleged in said paragraph.

VII

For answer to paragraph XXXIX, this defendant denies the same, and each and every allegation therein contained.

[fol. 39]

VIII

For answer to paragraph XL, these defendants deny the same, and each and every allegation and things therein contained.

Wherefore, having fully answered the complaint of the plaintiff, these defendants pray that they go hence with their costs and expenses herein incurred, as provided by law.

G. W. Hamilton, Attorney General; W. A. Toner, Assistant Attorney General; Daniel Baker, Attorneys for Defendants.

Duly sworn to by E. Pat Kelly. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 40] IN SUPERIOR COURT OF THURSTON COUNTY

No. 15804

THE STATE OF WASHINGTON on the Relation of Foss Company, Inc., a Corporation, et al, Plaintiffs,

vs.

E. PAT KELLY, as Director of the Department of Labor and Industries of the State of Washington; Jay Olinger, as Supervisor of the Safety Division of said Department, and Howell Parker, as a Deputy of Said Director under the title Marine Inspector, Defendants

MEMO OPINION—Filed May 17, 1935

It is impossible for this Court to reconcile many of the authorities cited by counsel. However, after a rather thorough consideration, it is the opinion of the Court that the act complained of is susceptible of a construction by the defendant that would not be overlapping the field covered by Federal law. In so ruling, the Court is expressing no view as to the specific acts on the part of the defendant.

An order may be taken in conformity herewith.

D. F. Wright, Judge.

[File endorsement omitted.]

[fol. 41] [File endorsement omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

No. 15408

THE STATE OF WASHINGTON on the Relation of Foss Company, Inc., a Corporation; Allman-Hubble Tugboat Company, Inc., a Corporation; Bellingham Tug & Barge Co., Inc., a Corporation; Capital City Tug Co., Inc., a Corporation; Cascade Tug Boat Co., Inc., a Corporation; Crosby Sand & Gravel Company, Inc., a Corporation; James Drahm, Foss Launch & Tug Co., Inc., a Corporation; O. D. Houchan, Johnson Tug & Barge Company, Inc., a Corporation; John S. and Allen McEwan, Doing

Business as McEwan Brothers; Merrill & Ring Lumber Co., Inc., a Corporation; Nemah River Towboat Company, Inc., a Corporation; Northwestern Logging Company, a Corporation; John Olson and Ed M. Olson, Doing Business as Olson Tug Boat Company; Olympia Towing Company, Inc., a Corporation; Pioneer Towing Co., Inc., a Corporation; Pioneer Transport Company, a Corporation; Puget Sound Tug & Barge Co., Inc., a Corporation; Schafer Bros. Lumber & Shingle Company, a Corporation; Shively Two Boat Company, Inc., a Corporation; Delta V. Smyth, Sunset Tug & Barge Co., a Corporation; Tacoma Tug & Barge Co., Inc., a Corporation; Fred W. Thurber, Transit Towboat Company, Inc., a Corporation; R. J. Ultican Tugboat Co., Inc., a Corporation; Wagner Tug Boat Company, a Corporation; Clifford W. Waterman, Doing Business as Waterman Towing Co.; Knappton Towboat Co., a Corporation; Shaver Transport Co., a Corporation, Plaintiffs,

vs.

E. Pat Kelly, as Director of the Department of Labor and Industries of the State of Washington; Jay Olinger, as Supervisor of the Safety Division of Said Department, and Howell Parker, as a Deputy of Said Director under the Title Marine Inspector, Defendants

Judgment—Filed June 24, 1935

[fol. 42] This matter having come on before the court for hearing on the 27th day of March, 1935, the plaintiffs appearing by their attorney, John S. Robinson, Esq., and the defendants appearing by the attorney general, W. A. Toner, Assistant attorney general, and Daniel Baker, Esq., and the court having heard the testimony of the witnesses produced by the respective parties and having considered the exhibits introduced and having heard the argument of counsel for the respective parties, and being fully advised in the premises; and it appearing further to the court that the defendants have heretofore interposed a demurrer of the plaintiff's complaint on the ground, among others, that several causes of action have been improperly united; that the complaint does not state facts sufficient to constitute a cause of action; and that the court has no jurisdiction over

the subject matter of the action, and the court being of the opinion that chapter 200 of the 1907 session laws of the State of Washington is susceptible of such a construction by the defendants that would not be overlapping the field covered by the federal law, and until and unless the contrary appears this court should not restrain alike acts both within and without the jurisdiction of the department, reserving the right, and without prejudice to the right on the part of the plaintiffs to hereafter complain of and secure relief in case the defendants should transgress upon the field covered by the federal law; now, therefore, it is

Considered, Adjudged and Ordered by the court that the complaint of the plaintiffs be, and the same is, dismissed with costs to the defendants to be hereafter taxed, and further that the temporary restraining order herein be vacated and set aside.

D. F. Wright, Superior Judge.

Copy received this June 24th, 1935.

John S. Robinson, Atty. for Plff.

Presented by W. A. Toner, of Attys. for Defendants.

[fol. 43] [File endorsement omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

NOTICE OF APPEAL—Filed July 3, 1935

[fol. 44] To the Above Named Defendants and to the Honorable G. W. Hamilton, W. A. Toner and Daniel Baker, their attorneys:

Please take Notice:

That the plaintiffs above named and each and all of them feeling aggrieved by that certain final order of the Court, made, entered and filed on June 24th, 1935, dismissing the above entitled proceedings, herewith appeal to the Supreme Court of the State of Washington from the said order and from each and every part thereof.

John S. Robinson, Attorneys for Plaintiff.

Received a copy of the foregoing Notice of Appeal, this 3rd day of July, 1935.

W. A. Toner, Asst. Atty. General, of Attorneys for Defendants.

[fols. 45–47] Bond on appeal for $200.00, approved and filed July 5, 1935, omitted in printing.

[fol. 48] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 49–51] [File endorsements omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

No. 15804

THE STATE OF WASHINGTON on the Relation of Foss COMPANY, INC., a Corporation, et al., Plaintiffs,

vs.

E. PAT KELLY, as Director of the Department of Labor and Industries of the State of Washington; Jay Olinger, as Supervisor of the Safety Division of said Department, and Howell Parker, as a Deputy of Said Director under the Title of Marine Inspector, Defendants

Statement of Facts—Filed July 31, 1935; Filed in Supreme Court January 8, 1936

[fol. 52] Be It Remembered, that the above entitled cause came on regularly for hearing before the Honorable D. F. Wright, one of the judges of the above entitled court, sitting in Department No. 2 thereof, at the Thurston County Court House at Olmypia, Washington, at the hour of ten o'clock a. m. on Wednesday, the 27th day of March, A. D., 1935; the parties herein appearing by their respective attorneys as follows:

The plaintiff by John S. Robinson;

The defendants by W. A. Toner, Assistant Attorney General, and Daniel O. Baker, of counsel;

Kenneth Durham, Appearing amicus curiæ.

STATEMENT OF COUNSEL

Mr. Robinson: May it please the Court, the Court is somewhat familiar with this case due to the long argument we had in December on the demurrer. Since that time there has been an Answer filed here, and I think it might be well to briefly go over the issues again before we call the testimony.

This is an action brought by thirty-one firms or individuals operating tugs at some time or another upon waters within the territorial boundaries of the State of Washington, and was brought to secure a writ of prohibition against the Director of Labor and Industries, against the head of the Department of Public Safety, and against Howell Parker, as a deputy under said director, under the title of Marine Inspector.

[fol. 53] The first thirty-one paragraphs of this Complaint describe in a general way the vessels which are owned or operated by these plaintiffs. A tabulation of those shows that there are one hundred seventy-two of them. Thirty-three of them are steam vessels about which I think, under the issues as now made up, there will be no substantial dispute; and one hundred thirty-nine are vessels operated by some form or other of internal combustion engines. In the pleadings I have referred to these as Diesel vessels, which is not accurate because some of them are gas boats. When I say Diesel vessels I mean operated by some power other than steam. Of these vessels, ninety-eight are less than sixty-five feet in length and forty-One are more than sixty-five feet in length, and five of them are of a burden in excess of a hundred gross tons.

Now, the action centers around the allegations beginning after '31. We allege that these three individuals, as officers in their official capacities, have mis-construed chapter 200 of the Laws of 1907 and are proceeding to exceed any authority which they have under any law to do certain acts. Those acts are described in paragraph thirty-four of the [fol. 54] Complaint, and I think that it might be well to review them:

We set up there that these parties, assuming to act under virtue of the law of 1907, are going to do certain things with reference to all vessels operating at any time upon any waters within the territorial boundaries of the State of

Washington, except such as are inspected by the steamboat inspectors;

And that they are, that they threaten to cause the prosecution of these plaintiffs and all other owners of such vessels found navigating on the waters of the State of Washington unless they obey the light rules set down in such laws;

And threaten to institute suits for penalties under the law against any of these vessels unless the owners submit the vessels to inspection annually, or oftener if the Director deems it necessary, by the defendant Parker or other inspectors;

That they must make such changes, repairs and improvements as the Director may require;

That they will prosecute them for penalties unless they carry such officers as the Director, after examination, shall license as masters, pilots and engineers; unless they carry such crews as he shall deem necessary to manage the vessel [fol. 55] safely; unless they carry such life-saving equipment as the Director shall require; unless they carry sufficient fire prevention apparatus as he shall require; unless they keep on board a copy of the license issued by him authorizing the vessel to navigate in and upon the waters within the State, the same to be posted in a conspicuous place; unless they keep a copy of the first twenty-two sections of the Act posted in a conspicuous place on said vessel; and keep two copies of the navigation rules set out in section 8 of the Act posted in the vessel, one in the pilot house, the other in a conspicuous place; unless they keep the vessel's name painted on her stern in the character and colors prescribed by section 16 of the Act;

And, finally and generally, unless they will comply with "all orders, regulations and requirements of the Commissioner;" that is to say, of the defendant Director of the Department of Labor and Industries and his co-defendants, because the Act provides in its last paragraph that any inspector employed by the Commissioner, now Director of the Department of Labor and Industries, "may perform any act and exercise any authority herein prescribed for the Commissioner of Labor."

Now, in the Answer which was filed recently, the defend- [fol. 56] ants say that—"deny that they have, in any manner, erroneously construed chapter 200 of the Session Laws

of 1907 of the State of Washington, and deny that they have attempted to exercise jurisdiction over vessels generally, the inspection of which is by law delegated or assumed by the United States; admits that the Director intends to apply the Act to the vessels of the plaintiffs generally described in the petition; and alleges that said vessels navigate largely between ports in the state of Washington and within the territorial boundaries of the state of Washington; that as to vessels operated by steam and not over a certain length and tonnage, and as to other vessels operated by machinery, these defendants proposed to apply the Act of 1907 as hereinbefore referred to and the rules and regulations of the Director based thereon; admits that the defendants circulated the placard mentioned in subdivision 1''—that is the one concerning lights—''and alleges that it is the duty of each boat of the class hereinafter referred to to comply with such regulations.

The defendants further admit that they have promulgated certain regulations similar to those contained in subdivision 2 of paragraph 34''—those are the things I [fol. 57] just read—''and, insofar as they are consistent with regulations made by the United States, are reasonable and proper and are in accordance with the Act, and that, as to such of said regulations as are covered by Federal statutes, they neither have in the past, nor do they intend in the future to attempt to enforce any such provision or regulation which conflicts with a regulation lawfully established under and by virtue of the laws of the United States of America.''

If I understand that pleading rightly, counsel say they will not attempt to enforce any of these things insofar as they are contrary and conflicting to Federal law, but do intend to enforce as far as they are consistent.

If the Court pleases, I don't think it is necessary to go further, except to say our position is this: that we are entitled to have the writ of prohibition now in force made permanent for a number of reasons. Not to argue the case, but to state at this time, so the Court may have in mind as we go along what our contentions are, the first reason is that we think this law should be construed to apply only to land locked lakes in the State of Washington and not at all to waters, public waters of the United States.

[fol. 58] That is a question of construction. We shall, in due time, argue to Your Honor that so many of these things obviously were beyond the power of the State to pass that it must have thought it was legislating for the land locked lakes over which it has full authority.

The second point will be that, in any event, so much of this law, practically all of it, is unconstitutional when passed, or, if not unconstitutional when passed, has been superseded by subsequent Federal legislation, that the Court will hold the entire law void, and deem, if the Legislature had not, the entire scheme was illegal and the entire law must be declared void, although occasional sentences are found which might stand.

In that connection, Your Honor will remember there is no saving clause in the law.

The third is that, in any event, none of these vessels which are involved in this suit are contemplated by the law as it now stands, because we contend that all of them are, in some way or other, subject to the inspection laws of the United States. We, of course, do not claim they are all subject to the steamboat inspectors; but the law does not say subject to the steamboat inspection laws. It says [fol. 59] except those subject to the inspection laws of the United States.

And, finally, we shall also point out to Your Honor that practically everything, and I shall contend everything, in regard to every vessel here is covered by some enactment or regulation having the force of law of the United States. And under the well known rule *that where the United* States has legislated upon a commercial matter that all state enactments must fall, if any there were. That, under that rule, this matter should be made permanent.

There are many subsidiary matters connected with this thing which will turn up as we go along, but I think that is all that is necessary as far as we are concerned, to advise the Court and counsel of the main issues of law and fact. The Answer also denies, for lack of information, the first thirty-one paragraphs of the Complaint. Of course, counsel could not do otherwise than admit something he did not know anything about, and as the pleadings stand, I shall have to go on and prove those as well as I can; and I think I have got practically everybody here, and I will begin upon that task immediately.

Mr. Toner: I think counsel rather misunderstood the matter. I told counsel that our denial was a proper formal denial; that we knew nothing about those matters and the [fol. 60] only thing we desired to question was certain inaccuracies with reference to things alleged in there with reference to the boats that would probably arise in the evidence, and we didn't intend to ask you to prove each and every one of the dimensions of these boats miscellaneously.

Mr. Robinson: Can we stipulate in some form on the matter in that case?

Mr. Toner: Before we proceed with the case, in checking over the Complaint, I read section 33 as to the conclusion of law, and I therefore did not particularly deny it, but I find that in the latter part of the paragraph there may be something that isn't a conclusion of law and, if so, I would like to have our Answer amended to specifically deny. The paragraph reads:

"Said Act confers upon the Commissioner of Labor (now the Director of the Department of Labor and Industries) broad and extensive regulatory powers over certain classes of vessels therein described navigating in and upon navigable waters within the exclusive jurisdiction of the State of Washington, that is to say, upon internal landlocked waters of the State as distinguished from other waters therein which, through their connection with other [fol. 61] waters, are capable of being used as highways for interstate and foreign commerce, being a part of the waters usually referred to as navigable waters of the United States."

We do not intend by a failure to deny that allegation, to admit it applies only as counsel suggests, to land locked waters, or lakes, as counsel expresses it. But we contend the Act applies within the territorial limits of the State of Washington and that would include practically all of Puget Sound outside of certain portions of the Straits of San Juan, practically at the place where the State boundary runs through the Straits.

Mr. Robinson: Mr. Toner, I can't very well ask you to admit everything in those first thirty-one paragraphs, but what stipulation can we make concerning those? Are you willing to stipulate the ownership of the vessels is as

stipulated in the first thirty-one paragraphs, and the enrollment and registry is as recited, and that those vessels stated to be under sixty-five feet in length in that paragraph are, in fact, under sixty-five feet?

Mr. Toner: I think that is true as to a large majority of those matters. I think it may be stipulated that, except as our testimony shows, or our witnesses, with respect to some particular boat, that it is not of that character, that [fol. 62] would be the only kind of a one we would want to raise.

Mr. Robinson: If that is the case, you should notify me now, because I don't want to keep thirty-one people here in case of that, if something comes up.

Mr. Toner: I think it is not material to the issues, and so I think it would be well to stipulate to all of them.

Mr. Baker: We would like to have you keep the owners of the Hubble Tugboat Company because we want to call them for adverse witnesses later on.

Mr. Robinson: Then it is stipulated that I will not be required to put on witnesses as to the sizes.

Mr. Wedell Foss, being a witness called on behalf of the plaintiff, after having been first duly sworn, testified as follows:

Direct examination.

By Mr. Robinson:

Q. Mr. Foss, you are an officer of the Foss Company, Incorporated, are you not?

A. Yes.

Q. What officer?

A. President.

Q. Is that the company that has its headquarters in Seattle?

A. Yes.

Q. You are also an officer of the Foss Tug and Launch Company, Incorporated?

[fol. 63] A. Yes.

Mr. Baker: I am sorry we didn't state this before. If the Court will notice, we reserved our demurrer which the Court has not ruled upon. We would like to have it noted for the record.

The Court: It may be understood.

Mr. Robinson:

Q. What officer are you of the Tacoma company?

A. Vice president.

Q. Mr. Foss, you have been in the tugboat business on Puget Sound for a long time?

A. Yes.

Q. You grew up in it, did you not?

A. Yes.

Q. Your father was operating tugboats on the Sound before you were born, or about that time, was he not?

A. Just about.

Q. Under the stipulation here, it will be unnecessary to go into the particulars of your boats, but I will ask you some matters which are not covered in the pleading along particulars. Have you any vessels of more than a hundred tons burden, I mean operated other than steam, in the Foss Company?

A. Yes.

Q. What vessels?

A. Tug Arthur Foss and tug Andrew Foss.

Q. The Arthur Foss is which company?

A. Tacoma.

Q. And the other one, is it not, Seattle?

[fol. 64] A. Seattle.

Q. Those are the only motor driven tugs you have in your two fleets that have over a hundred tons burden?

A. That is correct.

Q. Mr. Foss, do you, under ordinary conditions, ever use these tugs in foreign trade?

A. Quite often.

Q. Where to?

A. Straits of Juan de Fuca. California.

Q. Do you have to go between points in Washington and points in British Columbia with those tugs?

A. Yes.

Q. Have you ever had to take coal with motor driven tugs?

A. Yes.

Q. Any point to the Columbia River?

A. I don't think we have been down there recently.

Mr. Baker: We will stipulate they are used in commerce outside of Puget Sound. You have alleged that.

Mr. Robinson: May I go a little further, Mr. Baker, and I may ask you to extend your stipulation a little.

Mr. Baker: I can't see the materiality of it, but I have no objection.

Mr. Robinson:

Q. Mr. Foss, how large a tug is capable of towing business, for instance, with British Columbia?

A. British Columbia, geographically, is the same as the State of Washington. The same tugs except the little harbor tugs in the Sound can go to British Columbia and Vancouver Island.

[fol. 65] Q. You have been over this situation with me and you know fairly well all these tug boats on the Sound, do you not?

A. Yes.

Q. Would you say substantially all the tugs in this Complaint are capable of towing between the State of Washington and British Columbia?

A. The majority of them. Some of the Harbor tugs aren't.

Q. The vast majority are?

A. Yes, sir.

Q. Now, Mr. Foss——

Mr. Robinson: Mr. Baker, will you extend your stipulation to that extent? That the majority of motor tugs involved here are capable of going between British Columbia and Washington?

Mr. Toner: We have no objection to that.

Mr. Robinson: Very well, I will drop that permanently.

Mr. Toner: Only as to their capability of doing it.

Mr. Baker: That is, they are capable of towing between the United States and Canada, or along the Coast. You didn't mention along the Coast.

Mr. Robinson: I wasn't asking along the Coast, but you are not prepared to admit that a lot of these actually do?

Mr. Toner: We don't question they do occasionally, but as to their actual work, we want to examine into that. Our contention is a lot of their work is intrastate.

Mr. Robinson: I am willing to admit that undoubtedly, taking these vessels as a whole, the largest part of the [fol. 66] time is concerned with purely intrastate work; but

I wish to prove, unless you will admit it, that substantially all of them are capable of towing interstate or foreign, and that a great many of them do from time to time, have and will continue to do so, and are capable of doing it.

Mr. Toner: I think that is satisfactory.

Mr. Baker: Instead of saying substantially all, we will say the majority, as Mr. Foss says.

Mr. Robinson:

Q. Mr. Foss, does the Coast Guard ever have anything to do with these tugs?

A. Yes.

Q. What?

A. Well, they inspect them for——(interrupted).

Mr. Baker: I wish to rise to an objection. It occurs to me we aren't interested in what the Coast Guard does. It is what they have power to do, and it is according to statute.

The Court: He may answer.

Mr. Robinson: I can't prove everything at once. I will prove they have the power to do it and do do it. You are not going to contend that the Coast Guard is acting illegally all the time in stopping these fellows whenever they want? Are you going to raise a contention that the Coast Guard, in stopping these men when they want to, are acting illegally?

Mr. Baker: I don't think you can put those words in my [fol. 67] mouth. The only thing concerned here is whether or not, as a matter of statute, the power is in the Coast Guard to do it. That isn't a matter of testimony any more than if I were to go out and hold myself up for a practice of medicine. The question wouldn't be whether I was practicing medicine, it would be whether or not I had a right to. That is the way with everything you have alleged. This is a question of law, not a question of fact.

Mr. Robinson: The Coast Guard's activities will be determined by what the Coast Guard does.

The Court: You may put on the proof.

Mr. Baker: May we have an exception?

Mr. Robinson:

Q. Go on, Mr. Foss.

A. The Coast Guard Cutters overhaul our vessels from

time to time and the Captain in charge is duly signed on. At the Custom House they observe whether your name is painted on according to law. They look at your life-preservers and see the rules of road are posted, and exercise considerable authority in whether you blow the right kind of whistles.

If you don't signal right, and your maneuvering is improper, they levy fines for that offense.

Q. Do they go over your fire prevention equipment?

A. Yes.

Q. Do they go over your life preservers?

A. Yes.

[fol. 68] Q. Do they look into whether your official number is cut on your main beam and things of that sort?

A. Yes.

Q. Does anybody from the Custom House do anything of that sort, from the Custom service?

A. They do that when the numbers are carved in originally, and in some ports, and a while in Seattle, the Custom had their own boat supplementing the Coast Guard activity.

Q. So they took charge of the same activity of the Coast Guard?

A. Yes, they are the same, under the Treasury Department.

Q. What is a navigation inspector, do you know?

A. No, I don't. Do you mean the——

Q. You find in the Commerce Department reference to navigation inspectors. Who are those?

A. Those are the United States steamboat inspectors.

Q. There are others?

A. They don't operate in Puget Sound. They do in other parts of the country.

Q. Mr. Foss, you built some of these tugs and put them in operation during your experience in the tug boat business?

A. Yes.

Q. When you build a new tug, say a fifty-foot power driven tug, do you have to have any inspection by the Government and, if so, by whom?

A. The Custom service of the Treasury Department inspects the vessel for the size. You have to take out what they call the papers of enrollment. You have to provide

[fol. 69] a Master Carpenter's certificate describing the vessel and saying you have authority to register it. You have to file a paper you are an American citizen. They send an ad-measurer out and he surveys it carefully and reports to Washington for size and the people in Washington compute her tonnage, and they give her an official number and it is carved in the main beam of the vessel and the official tonnage is carved in; and they send an inspector out to verify it, and then they issue the registration enrollment, or license.

Q. Whichever you apply for?

A. Yes.

Q. Do they check over the lights, and so on, and the equipment at that time?

A. Not at that time. The Coast Guard checks over that after you get going.

Q. Where does the Coast Guard make these inspections, come around regularly to your dock?

A. They come around at least once a year, and oftener.

Q. You mean they come to the headquarters of the company and go over the vessels?

A. Sometimes they come to the headquarters and sometimes they meet you outside when you are under way.

Mr. Robinson: You may take the witness.

[fol. 70] Cross-examination.

By Mr. Baker:

Q. Mr. Foss, are you acquainted with—you have steamboat tugs, do you not, operated by steam?

A. Just one.

Q. How large is that steamboat?

A. It is a very small one.

Q. Over forty feet?

A. Yes, sir.

Q. It is over forty feet?

A. Yes, sir.

Q. Is it under sixty feet?

A. About sixty-five feet, I believe.

Q. Have you ever operated boats, steamboats, which carried freight or which were engaged in the business of carrying passengers for hire?

A. We have never operated a steamboat that carried freight and passengers for hire.

Q. You are familiar, of course, with the Federal steamboat inspection laws?

A. Yes, sir, very well.

Q. You know there is a man called the inspector of steamboats in Seattle?

A. I do.

Q. And there is an inspector of the boilers?

A. Yes, sir.

Q. And there is an inspector of hulls?

A. Yes.

Q. Have you ever made—it is customary, you know, do you not, Mr. Foss, that when a boat is put into operation, [fol. 71] that is, a steamboat, to make an application to the United States Service requesting that the boat be licensed?

A. Yes.

Q. Have you ever made an application for the license of any of your motor driven tugs?

A. Do you mean a license to own the vessel or——

Q. License to operate.

A. We have for all of them.

Q. I am not referring to enrollment and registration. I mean a certificate. Did you make an application for certificate of inspection?

A. Only where the Federal authorities inspect as a matter of custom or perpetration.

Q. As a matter of fact, that certificate is required from steamboats?

A. Yes.

Q. That is, in order to operate a steamboat, you have to have a certificate certifying that the boat has been inspected by the inspector of hulls, and by the inspector of boilers; isn't that true?

A. Yes.

Q. And it is necessary for you to apply for that certificate of inspection?

A. That is correct.

Q. Now, as a matter of fact, for any of your motor driven tugs you have never applied for a certificate of inspection, isn't that true?

A. We have never applied.

Q. Why haven't you applied?

[fol. 72] A. Well, they haven't interpreted the law to mean Diesel driven tugs.

Q. The inspectors of boilers and hulls, being inspectors of the United States government, have not, you say, interpreted the law to apply?

A. To motor driven tug-boats.

Mr. Robinson: We admit that the inspector of steamboats doesn't inspect motor driven boats.

Mr. Baker: Is some machinery required to be inspected?

Mr. Robinson: Some of it is.

Mr. Baker:

Q. As a matter of fact, Mr. Foss, you know, as a matter of inspection, the Federal authorities have never exercised or have never held themselves out to have the power to make that kind of inspection?

A. They never have to my knowledge, in this part of the country.

Q. Now, the inspector of hulls, as far as you know, has never gone aboard any of your boats to inspect for its seaworthiness?

A. Yes, whenever a vessel changes its name the law says the United States steamboat inspectors of hulls must inspect the vessel and report that she is seaworthy, and the matter of load line. I don't know whether that is the American bureau or steamboat inspectors inspect that way. So every vessel of ours, practically, that have had their names changed have been inspected by the United States inspector of hulls for seaworthiness.

Q. Will you tell me what section of the law you are referring to?

[fol. 73] A. I will have to—look under Change of Name, Mr. Robinson.

Mr. Baker:

Q. Mr. Foss, these steamboats are inspected annually?

A. Yes.

Q. As a matter of fact, one of your motor tugs could run twenty or thirty years if the name was not changed without inspection by the inspector of boilers or hulls?

A. That is true, but the Coast Guard will—(interrupted)

Q. We will get to the Coast Guard in a moment. As a matter of fact, don't you know it to be a practice for certain owners of boats to substitute their steam driven power to put motor power in the boats to avoid inspection by the United States government?

A. I know the opposite to be true.

Mr. Robinson: You keep saying by the United States government. I tell you we admit we are not subject to inspection by the steamboat inspectors. Confine it to steamboat inspectors. That is a misleading question, as you put it.

Mr. Baker: I have no intention to mislead Mr. Foss.

Mr. Robinson: I have no intention that you will.

Mr. Baker:

Q. I asked you that, for the purpose of avoiding inspection by the United States inspector of hulls and boilers, that is for seaworthiness and for the fitness of mechanical or boiler equipment, it has been the practice by owners of tugs operating in and around this state, to change the type of equipment they have to motor driven equipment for the [fol. 74] specific purpose of avoiding inspection by the inspector of hulls and boilers.

A. The answer is no, because Diesel driven vessels, for the most part, carry as many men as the law would require if under the steamboat inspection.

Q. I am talking about seaworthiness, mechanical equipment.

A. I think the Diesel vessels are more seaworthy than the steam driven.

Q. That is because of the man that owns the boats, and not because of more power to make them seaworthy.

A. I think that is true. I think you take better care of your property than a man appointed to take care of it for you.

Q. If you didn't have regard for your boat and the value of your boat and the safety of the people operating your boat, that boat could go along in an unseaworthy condition for a period of thirty years and there wouldn't be any power upon anybody to make you put that boat into seaworthy condition. Isn't that true?

A. It is practically true. It assumes a picture that isn't so, though. You could walk in front of a railroad train as it runs down the track, but normally you don't.

Q. Now, getting around to the United States Custom officials; that is, the Coast Guard service, the Coast Guard never uses the right of inspecting any of these motor driven tugs for seaworthiness of hull?

A. No.

Q. Now, do they go below decks to inspect the mechanical equipment, motor and such, boilers or tanks as necessary in the operation of the boat?

[fol. 75] A. They inspect the life-saving equipment and fire equipment.

Q. They don't inspect the mechanical equipment that drives your boat?

A. No. I don't know any reason they couldn't if they wanted to. If they thought it needed it. They are custodians of life at sea.

Mr. Baker: We ask the answer be stricken. We asked if they did it, and he said they didn't.

The Court: I think it may stand.

Mr. Baker:

Q. Mr. Foss, you are an attorney at law, aren't you?

A. I was years ago. I haven't practiced for sixteen or seventeen years.

Q. You specialized in Admiralty Law, didn't you?

A. Yes, for five years, six years.

Q. Do you know anything about the tug Winona?

A. Yes.

Q. That is your tug?

A. Yes.

Q. That boat was built in 1907

A. Something like that. I can verify it.

Q. Was it named Winona at that time?

A. Yes, sir.

Q. When did it sink?

A. Three or four years ago.

Q. 1933, approximately?

A. Yes.

Q. Was it named Winona at the time that it was built?

A. Yes.

[fol. 76] Q. As a matter of fact, that Winona never had an inspection for seaworthiness by the United States inspector of hulls from the time it was built until it sunk?

A. That one didn't. That was one of the few that didn't.

Q. Mr. DeLong was Captain of this Winona at the time she sunk?

A. Yes.

Q. Did you know at the time that this boat was sunk that it was in unseaworthy condition?

A. I didn't know it then; I don't know it now.

Q. Was it in unseaworthy condition?

A. No.

Q. If testimony were offered to prove the boat were rotten and unseaworthy at the time it was sunk, you would deny that?

A. I would deny it. I can show you the boat in Tacoma. She is in the shipyard and there hasn't been anything done to her since she sank.

Q. At the time she sank, was the water calm or rough?

A. I wasn't there. I don't know.

Q. What caused this boat to sink?

A. Well, I don't know.

Q. No collision?

A. She was abandoned by her crew, I think; and it was fairly rough. I haven't got detailed reports about her.

Q. You were the owner of the boat at the time it sunk?

A. Yes.

Q. And you would be interested in making a detailed investigation at the time it sunk?

A. I don't know why she sunk. She floated around all night after the crew left.

[fol. 77] Q. As a matter of fact, the boat was rotten and its seams leaking, and the crew had to leave?

A. No.

Q. Why did the crew leave the boat?

A. I can give you my theory. I can't give you facts. I wasn't there.

Q. What was your investigation as to the reason the crew left the boat?

A. Well, you want me to tell you why they left the boat?

Q. What did your investigation disclose as to the reason?

A. We brought the boat up and drydocked her and are going to start her out pretty soon, without much change.

Q. You say you made an investigation, is that right?

A. Yes, I did.

Q. Did the Captain report to you?

A. Yes.

Q. What did the Captain tell you was the cause for the boat sinking?

A. Well, he said she started to sink, started to make water, and he started his—I will get these facts now. He was out off the Straits of Juan de Fuca and that is a notoriously bad place for ground swells. I don't remember if he said it was very rough that night or not. The vessel started to make water, and he started the bilge pump and the belt on the bilge pump wouldn't work and the water gained on him slowly and a fish boat came by and he thought, as he was correct in doing, it was better to let a hundred boats sink than to risk anyone's life, and he got on the fish boat and went for help.

Q. The bilge pump wasn't open to inspection, was it?

[fol. 78] A. No. And the boat floated around all night and later it sank. We don't blame him for leaving.

Q. Is it ordinary that a boat will ship enough water for no apparent reason and sink?

A. Anything made by human beings sometimes leaks; strikes emerged objects by the fault of no one, and the leak commences.

Q. Did you have any proof the boat struck a submerged object?

A. No.

Q. It isn't the ordinary history that a vessel that is seaworthy will ship water and sink for no apparent reason?

A. Obviously no boat will sink without a reason. You are quite correct in that.

Q. Now, you keep, as the owner of the Diesel tugs, you keep next to current legislation which may affect your property and your boats?

A. We do.

Q. As a matter of fact, you know there is a bill pending before the United States Congress which has for its specific purpose the vesting of the power in the United States Government inspection service to inspect these boats and make them subject to the same inspection as steamboats?

A. There has been such a bill pending for years and years in one form and another.

Q. It isn't your contention or your opinion, Mr. Foss, that the United States government has the power to make inspections for hulls or boilers or for mechanical equipment in your boats; let's say boilers, pressure tanks and the like, [fol. 79] and doesn't exercise—— (interrupted)

A. Ask the question again.

Q. It isn't your contention that the United States government has the power to inspect; that is, the inspection service of the United States government, has the power to inspect your Diesel driven tugs for the purpose of ascertaining the fitness of the mechanical equipment, pressure tanks and the like, and also the seaworthiness of the hulls, and doesn't exercise it?

A. Well, that is a pretty long question.

Q. I will re-phrase it. I don't want to confuse you. In brief, I mean this: it isn't your contention that the Federal inspection service has the power to inspect these Diesel driven motor tugs for seaworthiness at all and for fitness of mechanical equipment, and yet does not exercise it?

Mr. Robinson: If the Court please, I object to the question unless counsel defines what he means by Federal inspection service.

Mr. Baker: That is the inspection for hulls and boilers.

Mr. Robinson: I can answer that.

Mr. Baker: You are not testifying.

Mr. Robinson: Neither does he testify his contentions. He isn't making contentions about anything.

Mr. Baker: He is the plaintiff here.

Mr. Robinson: You don't ask a plaintiff his legal contention.

Mr. Baker: He is an experienced lawyer, and he is the plaintiff and should be in the court knowing what he is contending for. I think if the Court thinks my question is not [fol. 80] a sound one from a legal point, he will say so.

The Court: The prayer of the complaint would show what he is asking for, would it not?

Mr. Robinson: Furthermore, it is determined by the law. It is a question of law and the law fixes it.

Mr. Baker: I would say this is purely a matter of law.

Mr. Robinson: I told you I wasn't going to contend the Federal steamboat inspectors have the right to inspect the hulls of the motor boats.

Mr. Baker: We won't get anywhere in the trial of the case arguing between each other. You haven't asked for a ruling on the question.

Mr. Robinson: I object to the question on the ground you used "Federal inspection service". If you state it "United States steamboat inspectors", it is plain.

Mr. Baker: I amended it.

The Court: He may answer, then.

A. In my opinion, the United States inspectors of hulls and boilers who work under the Commerce Department have not the authority to inspect the tugs under the so-called United States steamboat inspection laws.

Mr. Baker:

Q. Mr. Foss, along the lines of that question, are you contending, or rather is it your opinion as a lawyer and also as an operator of tug boats, that the Coast Guard service has the right and authority to inspect your motor driven tugs for fitness; that is, for seaworthiness and for fitness of mechanical propelling equipment?

A. Well, I certainly think the Coast Guard has the au- [fol. 81] thority to prevent the loss of life at sea and to do anything reasonable to carry out their commission in this world; and, under that general broad theory, in my opinion, the Coast Guard could and would stop us from sending a vessel to sea that would endanger the life of the crew.

Q. The Coast Guard doesn't require you to have your motor driven tugs inspected?

A. They do not.

Q. They don't do that?

A. Except under the power to save life at sea.

Q. There has been no attempt made by the Coast Guard service to adopt, to make set certificate?

A. No.

Q. Or to have you inspected for hulls and mechanical equipment?

A. No, they have not.

Q. Are you familiar with this bill which is now pending before the Federal Congress, this bill, copy of which I received from the Secretary of Commerce office upon the advice of Mr. Robinson that such a bill was pending?

Mr. Robinson: Which one have you? There are two of them. What is the number?

Mr. Baker: This is—it is a bill entitled "To amend section 4426 of the Revised Statutes of the United States, as amended by the Act of Congress approved May 16, 1906."

Mr. Robinson: I have copy of it here.

Mr. Baker: "Be it enacted by the Senate and House of Representatives of the United States of America in Con-
[fol. 82] gress assembled, That section 4426 of the Revised Statutes of the United States, as amended by the Act of Congress approved May 16, 1906, be, and the same is hereby, amended to read as follows:

'Sec. 4426. The hull and boilers of every ferryboat, canal boat, yacht, or other small craft of like character propelled by steam, shall be inspected under the provisions of this title. Such other provisions of law for the better security of life as may be applicable to such vessels shall, by the regulations of the board of supervising inspectors, also be required to be complied with before a certificate of inspection shall be granted, and no such vessel shall be navigated without a licensed engineer and a licensed pilot; Provided, however, That in open steam launches of ten gross tons and under, one person, if duly qualified, may serve in the double capacity of pilot and engineer.

'That from and after three months after the date of the approval of this Act, all towing vessels, and all vessels of above fifteen gross tons propelled by machinery, the propulsion power of which is other than by steam, carrying freight or passengers for hire, shall be subject to all of the provisions of the law relating to steam vessels, insofar as they may be applicable thereto'.

"Sec. 2. That all laws or parts of laws insofar as they are in conflict with this Act are hereby repealed."

The question was whether or not you are familiar with that particular statute.

[fol. 83] A. I can't say I am. I know there are two or three laws pending that we rather favor.

Q. Rather than a statute, I meant a bill.

A. Yes. We rather like the Federal steamboat inspection service.

Q. Pardon me——

A. We favor the extension of the Federal steamboat inspection service.

Q. Do you subscribe to the Marine Digest?

A. I believe I do, yes.

Q. Mr. Foss.

A. Yes.

Q. Have you read the March 2nd, 1935, issue thereof?

A. If you show it to me, I can tell you if I have or not.

Q. It is the issue containing an article by the Secretary of Commerce, Daniel C. Roper, to Senator Copeland with, pertaining to legislation, or proposed legislation, relative to shipping.

A. I am sorry, I didn't read that, but I will gladly read it if you will hand it to me.

Q. As long as you haven't read it, I suppose I couldn't very gracefully interrogate you on its contents, Mr. Foss. Mr. Foss, the Customs inspectors of the United States Customs Bureau have never, have they, inspected your motor driven tugs for the purpose of ascertaining the seaworthiness of hull or the fitness of mechanical equipment?

A. They have sent the United States steamboat inspectors out to inspect the hulls when the names were changed.

Q. They haven't made any periodical inspection, annually or otherwise?

[fol. 84] A. No, sir.

Q. Or made you apply for a certificate of inspection?

A. No, but we would be glad to do so.

Q. There isn't any agency of the Federal Government which has required you to apply for a certificate of inspection for these motor driven tugs?

A. Not as a steamboat, but they inspect us all other ways; when it is built, and the whistles blown, and the maneuvers, and the fire extinguishers and the life-preservers.

Q. The question I put to you was whether or not any agency of the Federal government had ever required your motor driven tugboats to be inspected annually, or to have you apply for a certificate of inspection as to it's fitness for any particular purpose.

A. Well, I will state this. The United States steamboat inspectors of hulls and boilers have not required us to apply for inspection of the Diesel boats and tugs.

Q. Has any other investigation been made by the government?

A. Just the sea guard to inspect us on the sea or the dock, as I stated before.

Q. When they board you at sea, they look over the superficial equipment above decks, life-boats, fire extinguishers and lights, and so forth?

A. That is right, and they report people for infraction of the navigation laws.

Q. Do they attempt to supervise the life-boats you require?

A. They do life-preservers, lights, and fire extinguishers. I don't know about boats.

Q. I think they see if—they require just one life-boat? [fol. 85] A. I think they just see it is.

Q. As to personnel on your motor driven tugs, nobody has supervision on the part of the National government as to how many people shall be on your boats, or as to whether or not any member of the crew shall be a licensed officer, or examined for his qualifications?

A. No, not on tug boats. Not on motor driven tug boats.

Mr. Baker: That is all.

Mr. Robinson: That is all, Mr. Foss.

(Witness excused.)

(Whereupon a recess was taken for fifteen minutes. Upon reconvening, the following proceedings were had:)

Mr. H. T. Shaver, being a witness called on behalf of plaintiffs, after having been first duly sworn, testified as follows:

Direct examination.

By Mr. Robinson: The Court and counsel please, I have two clients here, I didn't know the details at the time I drew the Complaint, and in spite of my stipulating, I want to call them briefly.

Q. Your name is H. T. Shaver?

A. Yes, sir.

Q. Of the Shaver Transport Company of Oregon?

A. Yes, sir.

Q. It is an Oregon corporation?

A. Yes, sir.

[fol. 86] Q. Are you an officer of the company?

A. Yes, sir.

Q. What officer?

A. General manager.

Q. Where do you live?

A. Portland.

Q. You operate about seven large steam tugboats?

A. Yes, sir.

Q. And you have about ten motor driven tugboats?

A. Yes, sir.

Q. If my information is correct, the only one of those tugboats, that is, of the motor vessels, that has a gross tonnage of more than a hundred tons is the M. S. Shaver?

A. Yes, sir.

Q. She is longer than sixty-five feet?

A. Yes, sir.

Q. Do you recall what others of the tug boats are longer than sixty-five feet? The Smith would be, I guess, and I guess the James W.

A. There are probably five or six longer than sixty-five feet.

Q. What sort, or does your company do any towing between Oregon and Washington?

A. Yes, sir, practically ninety percent of our business is between Oregon and Washington.

Q. Between Oregon and Washington?

A. Yes, sir.

Q. Across the Columbia River?

A. Yes, sir.

[fol. 87] Mr. Robinson: I think that is all.

Cross-examination.

By Mr. Baker:

Q. Mr. Shaver, are you familiar with the publication called the Marine Digest?

A. Yes, sir.

Q. That publication is accepted in marine circles as a reputable magazine; I mean, it is recognized as a publication that has considerable circulation, is that true?

A. I don't know. I very seldom see it.

Mr. Robinson: I don't think that would have anything to do with his cross examination. You had better try that with somebody else, don't you think? All I have asked him is as to what boats he has and what they do.

Mr. Baker: I think, as a matter of fact, questioning about the boats and size and capacity and business opens up a whole field.

Mr. Robinson: It hardly opens up anything that appeared in the Marine Digest unless it applied to those particular boats.

Mr. Baker: I waive the question; although I am convinced of the soundness of my position, I don't think it is worth arguing about, so I withdraw the question.

Mr. Robinson: That is all.

Mr. Baker: Just a moment, please.

Q. Where do your tugs run from, Mr. Shaver?

[fol. 88] A. Their home port is Portland and they operate on the waters of the Columbia River, touching at Washington and Oregon points from Astoria to The Dalles.

Q. How much of your motor tugboat business, if you can segregate as to what is done with motor driven and steam driven tugs, is done between Oregon and Washington?

A. At the present time all of our towing activities is conducted by motor driven vessels, and I would say that sixty-five percent of our towing business is between Oregon and Washington.

Q. How much of your towing business is done between points, that is directly between points, on the Washington shore of the river, that is from Vancouver down the river, or the other way around, but between ports in Washington, on Washington territory?

A. Well, fifty percent of our towing business is from Washington ports to Oregon ports.

Q. How much is it from Washington ports to Washington ports?

A. Well, I would say that about twenty percent.

Q. How much of the time, Mr. Shaver, are your motor driven tugs, what proportion of the time are your motor driven tugs in Washington waters?

A. In Washington waters?

Q. That is, on the Washington side of the river?

A. That is kind of hard to say, Mr. Baker, because on

the Columbia River the tow boats go over what they call tow grounds and try as near as possible to keep out of ship channels and are crossing continuously back and forth across the ship channel, and in Oregon territory and then [fol. 89] across to Washington waters.

Q. As a matter of fact, your boats are, for a substantial portion of the time, that is, your motor driven tugs are operating for a substantial part of the time in Washington waters?

A. Yes, they do.

Redirect examination.

By Mr. Robinson:

Q. I take it from what you say, towing from one port in Washington to one in Washington, a tug might cross the water two or three times in Oregon waters and back again?

A. That is right.

Mr. Robinson: That is all.

(Witness excused.)

Mr. H. W. Britts, being a witness called on behalf of plaintiffs, after having been first duly sworn, testified as follows:

Direct examination.

By Mr. Robinson:

Q. What are your initials, Mr. Britts?

A. H. W.

Q. You are president of the Knappton Towboat Company, are you not?

A. Yes, sir.

[fol. 90] Q. Is that a Washington corporation?

A. It is.

Q. Where is its actual place of business, its headquarters?

A. Headquarters in Astoria.

Q. Astoria, Oregon. You also have about six or eight large steam tugs?

A. Yes.

Q. Have you any Diesel tugs of over a hundred ton burden?

A. There is only one that might be.

Q. Which is that?

A. The Melville.

Q. Ninety-three, according to your letter.

A. There are some of those details I couldn't answer. My primary business is logging, and not tugging.

Q. Do you remember writing me a letter in December about this?

A. I wrote the letter.

Q. You secured the correct information at the time you wrote the letter?

A. Yes, that is what I wrote.

Q. At that time you stated they were ninety-three tons. They were your biggest boats.

A. Yes, sir.

Q. You have two out of five that are longer than sixty-five feet?

A. It figures that.

Q. And the rest are under. Do your vessels go back and forth between Washington and Oregon?

A. Yes, sir.

Q. All of them?

[Vol. 91] A. Yes, sir.

Q. Well, confine it to Diesel tugs mostly. Do they engage in traffic across the river between Washington and Oregon?

A. Yes, sir.

Q. Much of the time?

A. Well, they are about as much in one state as the other. I mean the total length of the river, and naturally touching both territories going down the river.

Q. Even if she were towing between an Oregon port and another Oregon port, she would get in Washington waters?

A. Yes, sir.

Q. And if it were towing between a Washington port and another Washington port, she would get in Oregon waters?

A. Yes, sir.

Q. But there is considerable traffic from a port in Washington to a port in Oregon and vice versa?

A. Yes, sir.

Q. Do you take stuff across the river from one state to the other?

A. Yes, sir.

Q. About how much of the traffic is that kind, do you think?

A. About half of it.

[fol. 92] Cross-examination.

By Mr. Baker:

Q. What did you say was the——

A. Knappton Towing Company.

Q. I am sorry, but I don't believe I recall the number of motor tugs you said you had.

A. Mr. Robinson has the detail there.

Mr. Robinson: Five.

A. As I said before, I don't have details of the information at hand. I had to get it from someone else.

Mr. Baker:

Q. Can you estimate the percentage of the time that your boats are in Washington waters, your motor driven tugboats?

A. About half the time along the length of the river.

Mr. Baker: No more questions.

(Witness excused.)

[fol. 93] Captain Lindley Davis, being a witness called on behalf of plaintiffs, after having been first duly sworn, testified as follows:

Direct examination.

By Mr. Robinson:

Q. Captain Lindley Davis, you have been engaged in the tugboat business for a long time, haven't you?

A. Yes, sir.

Q. How long?

A. As an operator twenty-one years.

Q. What company are you connected with actively at present?

A. Puget Sound Tug and Barge Company.

Q. That is one of the plaintiffs in this case?

A. Yes, sir.

Q. And has quite a number of vessels involved?

A. Yes, sir.

Q. How many of your motor driven vessels are over a hundred tons burden?

A. I think two, if I am correct, two or three.

Q. The Gillette and what is the other one?

A. The Douglas.

Q. You are building one at the present time, are you not, another one?

A. Yes, sir.

Q. That will be over a hundred tons?

A. Yes, sir.

Q. And the rest of them are smaller vessels?

A. Yes, sir.

Q. Do any of your vessels go to the Dominion of Canada?

A. Yes, sir.

[fol. 94] Q. Do you go in to the Columbia River?

A. Yes, sir.

Q. To California?

A. Yes, sir.

Q. Especially these big fellows?

A. Yes, sir.

Q. Do the Coast Guard from the Custom House ever come aboard to look around your vessel?

A. Yes, sir.

Q. What do they do, in a general way?

A. They inspect them as to the lights, that they carry the proper lights and fog horns and whistles and life-preservers and fire extinguishers and things of that sort. Check the names and official numbers.

Q. They make no separate inspection of the hull?

A. No.

Q. Have you had that experience recently?

A. Yes.

Q. Tell us about it.

Mr. Baker: We don't question the fact the Coast Guard comes aboard and makes these inspections as that is the custom.

Mr. Robinson: All right, we will shorten this as much as we can.

Q. Do the Coast Guard and Customs people do substantially the same thing?

A. Yes, sir.

Q. Do they come around with any regularity at all?

A. No.

Q. What is this officer we run into in the Commerce re- [fol. 95] ports called, a navigation inspector?

A. I was told by them they were navigation inspectors.

Mr. Baker: We object to what the witness is told as being hearsay evidence.

The Court: If the inspector represented himself as such, I don't think it is hearsay.

A. He wore the badge of a customs officer and said he was a navigation inspector. The first time I had him designated as such was last summer. There was two of them delegated for about two weeks on watch at the slip in our office, and they said they were designated as navigation inspectors.

Mr. Robinson:

Q. Captain, what is a naptha launch?

A. It isn't.

Q. Never?

A. It used to be.

Q. You used to have an animal called a naptha launch?

A. It was something they had before gas line, to the best of my knowledge. It was used for some kind of fuel.

Q. Anyway, there are no more naptha launches?

A. I think they used it for oil to make steam.

Q. There are no more such launches either, are there?

A. Not that I know of.

Q. Were you in this state at the time this law of 1907 was passed?

A. Yes, sir.

Q. Do you know whether or not there was a navigation inspector appointed under that law or worked under it the early years after it was passed?

[fol. 96] A. There was a State inspector.

Q. Did he inspect vessels on Puget Sound?

A. No.

Q. Where did he inspect?

Mr. Baker: We object to the question as immaterial and not covering the scope the law covers. It must be construed from the law itself.

The Court: I think there is some competency in the construction the Department places on the law.

Mr. Robinson:

Q. Do you know whether or not there was a navigation inspector that made inspections?

A. There was. I knew him very well, Captain Hoyt. Inspected on Lake Chelan and Lake Whatcom and Lake Union and, I believe, Lake Crescent afterwards.

Q. Would you be able to say what years that was?

A. If my memory is right, it was about 1909 when Captain Hoyt was inspector.

Q. From 1909 and Lake Union in the center of Seattle was an inland lake and not connected with the navigable waters?

A. Yes, sir.

Q. And since the Canal went through it comes under Federal jurisdiction?

A. Yes, sir.

Q. Did you ever know Captain Hoyt to assert the right to make inspection of any vessel operating on the waters of the United States as distinguished from the land-locked waters of the lake?

[fol. 97] A. No.

Mr. Robinson: You may take the witness.

Cross-examination.

By Mr. Durham:

Q. You don't know what naptha is at all, you say?

A. I couldn't give an accurate definition, I don't believe. I have never handled it or been on a boat that was a naptha boat.

Q. It is just a high test gasoline, isn't it?

A. I thought it was a low test gasoline.

Q. A naptha launch was internal combustion engine driven by this low or high test gasoline.

A. My idea was a boiler they burned naptha in.

Q. You don't know what you are talking about?

A. Maybe not.

Mr. Robinson: Mr. Durham, a naptha launch is a steamboat.

Mr. Durham: I dispute that.

Mr. Robinson: That is the first kind of a launch the Foss Company had and we can enlighten you on that.

Mr. Durham:

Q. How long did you say you had been in the towboat business as an operator, twenty-one years?

A. As an operator, twenty-one years.

Q. What percent of your business is from a point in Washington to a point in Washington?

A. Well, that varies. Today, a hundred percent of it, I think; but it varies with the needs of the business.

[fol. 98] Q. And always a very large percent was on the waters of Puget Sound from a point in Washington to a point in Washington?

A. There were a number of years that the major part of our business was in British Columbia, during war time.

Q. Since the war, though, it has been largely here?

A. Yes.

Q. And now it is a hundred percent here?

A. Nearly so. I think they told me in the Anacortes office they had one boat on the way to British Columbia today.

Q. It is the larger boats you send to British Columbia through the waters of the Straits?

A. No; we send some of the smallest.

Q. How long since you have sent a tug to California?

A. Possibly once a year.

Q. That would be one of the steam tugs?

A. Not always. Sometimes it would be steam and sometimes a motor.

Q. When did you last send a tug to California, if you remember?

A. I think it was nearly a year ago. I can't recall definitely.

Q. What tug went down there?

A. The Cleo, steam tug.

Q. When did you last send a motor tug down?

A. I don't think for three years.

Q. How about the Columbia River; when did you last send a tug down the Columbia River?

A. I think last summer sometime.

[fol. 99] Q. Steam tug?

A. Yes.

Q. When did you last send a Diesel or motor driven tug?

A. I don't think I have had one in there for two years.

Q. These would be the very large ones only you would send out to sea?

A. Depending on what the tow was. Ordinarily when we go down there it is a large tow.

Q. An ocean going tug?

A. Yes.

Q. You say some navigation inspectors inspected your boats last summer?

A. Yes, sir.

Q. Did they inspect the hulls?

A. If they did, I didn't know it.

Q. Did they inspect the machinery?

A. Not that I know of.

Q. They went aboard to see if you had posted your navigation rules, didn't they?

A. And other things, not only navigation rules. Some of them don't require them to be posted.

Q. Did they give you certificates of inspection as to those matters?

A. No.

Q. It wasn't at all formal, then?

A. No, perhaps it isn't formal unless they give notice you are fined. If they are not all right.

Q. What do they look at?

A. Life-preservers, fire axes and extinguishers, and lights.

[fol. 100] Q. Look at the name?

A. Yes. And the official number and the tonnage.

Q. And that is all?

A. As far as I know.

Q. Didn't inquire as to your crew?

A. No.

Q. As to the training and experience of your personnel?

A. No, sir.

Q. Whether you had a Captain on the boat properly?

A. Yes, they looked at the papers to see.

Q. As a matter of fact, on these Diesel boats, anybody can take one out if he signs it as a Captain?

A. No, sir.

Q. What test does the United States government give, or examination, to qualify a man to run a Diesel tug?

A. He has to be an American citizen.

Q. Anything else?

A. Not that I know of.

Q. Any American citizen, then, if he signs as Captain, can take one out, as far as the United States is concerned?

A. Yes, sir.

Q. Anyone in this room that is a United States citizen could sign as your Captain on the boat and run it?

A. He could attempt to.

Q. As far as the Federal government goes?

A. Yes.

Q. Now, have you ever applied to the Federal Government for an inspection of the hull of any Diesel tug of yours?

[fol. 101] A. No.

Q. Or of the machinery or equipment?

A. No.

Q. Aside from the time when you have first had them built or have changed the name, has any official of the Federal government ever inspected any of your hulls or your machinery?

A. I don't think so.

Q. Now, when a boat is first built, customs officers, I think you said, go aboard and take a look at her and measure her?

A. Yes, sir.

Q. Have an ad-measurer who measures the hull to find out how long it is and what the tonnage is?

A Yes, sir.

Q. The purpose of that is to determine the size of the vessel for purposes of classification, isn't it?

A. I presume so. I don't know definitely what the purpose it. They can list it, I presume, as——

Q. And the same is true of when you change a name, they go aboard to find out how big the boat is for purposes of classification?

A. I don't believe they have to measure them for the change of name. If they do, I didn't know it.

Mr. Durham: That is all.

Mr. Robinson: If the Court please, could I have just a minute yet? I have a witness that wants to go to Portland.

Mr. Baker: I have three inspectors from the United States Government. They have left their office entirely [fol. 102] deserted and they are very eager to get back. I was wondering whether or not—I will be very brief with them and I was wondering if we could take them before adjournment for lunch. I hesitate to impose on the Court to that extent.

Mr. Robinson: I am willing to accommodate the inspectors if possible, but there will be a long cross-examination. I am willing to give you the right of way and stop my case and let you go on, but I must warn you there will be considerable cross-examination.

Mr. Baker: Under those circumstances, I think we had better wait until we adjourn. I have no objection to your taking the witness.

(Witness excused.)

Mr. H. T. Shaver, being a witness recalled on behalf of plaintiff, having been previously duly sworn, testified as follows:

Direct examination.

By Mr. Robinson:

Q. Someone spoke to me about a matter that the Coast Guard refused you permission to navigate some boat at one time. Was there such a circumstance?

A. We purchased a vessel at—on the Oregon coast, on the Coast at Bandon, Oregon, and we were going to bring the motorship under her own power, so before we started [fol. 103] out, the Coast Guard inspector of that district came aboard the vessel and notified our crew that we could not proceed to sea until certain alterations were made in her and she was made more seaworthy.

Q. What sort of alterations?

A. We had to board up a number of windows and put a toothpick over the bow and reinforce some of the hull. They said if we didn't do that, she wasn't seaworthy and

we had to take her under tow in envoy and we said we didn't know what authority he had and he said she was an enrolled vessel of the United States and, until we did that, he would put a watchman aboard and keep her there.

Cross-examination.

By Mr. Baker:

Q. As a matter of fact, somebody made a complaint relative to the seaworthiness of that vessel, did they not?

A. No, sir.

Q. There is a regulation of the United States Government, I think there is a statute provides where a complaint is made relative to the seaworthiness of the vessel, the Coast Guard has power to assume for inspection for seaworthiness.

A. I can't say. They exercised it in that case.

Q. Do—it was your opinion that they didn't have the power?

A. Yes.

Q. You didn't contest, however, their power by trying to get out?

[fol. 104] A. No.

Q. Who was the inspector?

A. The Commander of the Coast Guard at Bandon, Oregon.

Q. Do you know his name?

A. No, I don't. It has been ten years ago.

Q. That is the only time in your experience as a tugboat operator that anything like that occurred?

A. Yes, sir.

Q. You have never heard of another case where the United States Coast Guard attempted to regulate the seaworthiness?

A. I never did.

(Witness excused.)

(Whereupon an adjournment was taken until one-thirty p. m. Upon reconvening, the following proceedings were had and testimony taken, to-wit:)

Mr. Baker: If the Court please, I don't know whether or not Mr. Robinson has completed his case, but at this

time I would like to deviate from the normal course of procedure if Mr. Robinson will agree, and offer the testimony of the United States inspection service because, as I said before, these men are anxious to get back to Seattle.

Mr. Robinson: That is a little out of order, but it is all [fol. 105] right, except this, I said I wanted to cross examine these gentlemen; not so much cross examination as I want to examine them on my own part. The idea is that Captain Hutchins is qualified on the law of the United States and examining him directly will save reading the statutes. I am willing to have him called on what you may ordinarily call cross examination, you would call my own examination. I have some other witnesses, but I will make room so Captain Hutchins may get back.

Mr. Baker: We will call Mr. Oscar Dam at this time. The record will show we are deviating from the normal course of procedure to offer part of the defense.

Oscar W. Dam, being a witness called on behalf of defendants, after having first been duly sworn, testified as follows:

Direct examination.

By Mr. Baker: At this time we would also like to reserve our right to move at the completion of the plaintiff's case. We are offering this testimony, of course, subject to our reservation as to demurrer.

Q. Your name?

A. Oscar W. Dam.

Q. You are an employee of the Federal Government? [fol. 106] A. Deputy in charge of Marine Division, Federal Government.

Q. Your office building?

A. Federal Building, Seattle.

Q. You are under the Treasury Department, are you not?

A. I am.

Q. The Coast Guard is also under that department?

A. The Coast Guard is a separate department. Bureau of Coast Guard and Bureau of Customs.

Q. Will you state what inspection service of the United States Government maintains for the inspection of vessels?

A. Well, you refer to inspection of vessels by the steamboat inspection service?

Q. What I asked, what instrumentality of the Government maintained for the inspection of boats of any sort and description.

A. United States steamboat inspection service. It is now termed Bureau of Investigation and Steamboat Inspection.

Q. Do they maintain any other service for the inspection of vessels?

A. None with the exception of the American Bureau of Shipping, load line act and the load line treaty of 1930.

Q. Is there any tonnage connected with their——

A. Under the load line act the vessels of 250 gross tons, or larger, operating on foreign voyages, and under the International Treaty, reduced to 150 gross tons, and the sheltered waters between Port Angeles and Sitka have been included.

Q. They don't regulate in Puget Sound?

[fol. 107] A. Vessels between Seattle and Victoria wouldn't be required to be inspected and carry a load line certificate.

Q. Will you state whether or not this inspection that is made under the International, under the load line, state whether or not that is made at any stated intervals as a regular inspection, or upon request.

A. Any—before a vessel can clear on a foreign voyage outside of the sheltered area, if the vessel is of 150 gross tons or larger, must be inspected by a measurement society like the American Inspection Society and carry a load line certificate. And if they are not inspected and have the certificate, the penalty is $500.00.

Q. Do Diesel tug boats get inspected under this service?

A. All vessels of 150 gross tons or larger.

Mr. Baker: Mr. Robinson, are any of your tugs in question over 150 tons gross?

Mr. Robinson: Yes, one, the Shaver. Just a minute, I will tell you accurately. I have them down here. The M. S. Shaver belonging to the Shaver Company is 420 tons gross. The Arthur Foss, belonging to the Foss Launch and Tug Company is 225 tons gross; and there are no others over 150.

Mr. Baker: Are those steam or Diesels?

Mr. Robinson: They are Diesels.

Mr. Baker:

Q. State from your own knowledge, if you have such a knowledge, whether or not the Federal Government in-
[fol. 108] spects Diesel tug boats under the size of 150 tons for seaworthiness of hull and for fitness of propelling machinery.

A. It does not.

Q. Does the Federal Government attempt to regulate the size of the crew on these motor run tugboats?

A. Well, that is part of the other question. If we don't inspect them, we wouldn't have anything to do with their crew.

Q. Does the Federal Government require that there be any licensed officers upon these motor tugboats?

A. None.

Q. The Federal Government, however, the Customs Service, does inspect the boat at the time of its first original construction, does it not?

A. We don't use the word inspect; we use the word admeasure.

Q. What does the term mean?

A. The ad-measurement of vessels is done with the idea of establishing the correct width, length, breadth, and correct gross tonnage, and exceptions from the gross net tons are the lockers and the officers' quarters and like that are deducted. We have to establish the correct dimensions of the boat and it is done in the form of ad-measurement certificates and that information is used to issue a marine document to the boat.

Q. The marine document being a certificate of registration or enrollment?

A. Yes, sir, and it is used as a basis for Panama or Suez Canal certificates to collect tolls.

[fol. 109] Q. Will you state whether or not, at the time such inspection is made, any attention is directed as to whether or not the boat is seaworthy?

A. None whatever.

Q. Is there any inspection made of its machinery to determine its fitness at that time?

A. No, we have no jurisdiction over machinery.

Q. This testimony you have offered concerns itself with all vessels, is that what you were talking about, of all sorts or descriptions, or motor tugs?

A. The testimony relating to ad-measurement relates to all tugs.

Q. Will you state from your knowledge whether or not the Government at any time has any inspection service of any sort, any character, from the time a boat is built; that is, until the time a boat meets its decease, with reference to motor, Diesels, less than 150 tons gross, whether the United States Government ever, at any time, ever has any inspection for hulls, seaworthiness of hulls, or fitness of machinery?

A. Absolutely none.

Q. Will you state whether or not the United States Government requires these motor tug boats carry any life boats?

A. Well, life boats are always required by certificates of inspection. These vessels are not inspected and naturall wouldn't have to carry life boats pursuant to the regulation.

Mr. Baker: I think you may take the witness.

[fol. 110] Cross-examination.

By Mr. Robinson:

Q. Mr. Dam, you said a little while ago that no motor vessel under 150 tons was inspected as to her hull. You didn't mean that did you?

A. Just as to seaworthiness of hull, yes.

Q. What do the steamboat inspectors inspect for if it isn't for seaworthiness of hull?

A. You are referring to steamboats?

Q. He asked you all Deisel boats.

A. I think you made—if the motor boats of 150 tons or larger for hire are required to be inspected for——

Mr. Baker: My question was directed to tug boats and all those motor boats other than those which carry passengers for hire or freight for hire.

A. I didn't understand your question correctly.

Mr. Baker: My question was directed and, since we are only concerned in this suit with tug boats, my question was directed to motor tug boats.

A. That is what I understood that it was.

Mr. Robinson: We are concerned with more than tug boats. I said at the beginning this law was so full of — I was going to challenge it from——

Mr. Baker: I don't think you can challenge the constitutionality other than as to your particular complaint in this action. The law is well established the only individual to challenge the constitutionality of a law is the one involved.

[fol. 111] Mr. Robinson: I can say if the law is unconstitutional all the way through it bears on the constitutionality.

The Court: I am not going to restrict the record in a case like this where there is a real question. I think either party may develop the record very much as he sees fit so there will be a final determination of it on appeal.

Mr. Robinson: Mr. Baker, I don't think I am quite clear yet what Mr. Dam's testimony is. There is a mistake there somewhere.

Mr. Baker: I will re-phrase the question and ask it.

Mr. Robinson: Yes.

Mr. Baker:

Q. In order to make my position clear, the question I asked you, Mr. Dam, was directed to, along these lines, I can't re-state it exactly as I had it before, because I don't recall it myself, What I want to know is whether or not there is any inspection service by the United States Government upon motor tugs engaged in the business of towing, for the purpose of inspecting the seaworthiness of the hull and the fitness of mechanical contrivances that operate it under 150 tons gross.

A. No.

Mr. Baker: That is all.

Mr. Robinson: You are confining it to tugs now?

Mr. Baker: Yes.

Mr. Robinson:

Q. Is there any Federal inspection of any kind with reference to such tugs?

[fol. 112] A. Well, only to those tugs under the load line act of 150 gross tons or larger.

Q. You are under the Treasury Department?

A. I am.

Q. Do you pay any particular attention to the Department of Commerce reports and regulations?

A. Well, ninety-five percent of my work is for the Department of Commerce.

Q. You are familiar with the motor boat act of 1910 covering all motor driven vessels under 150 feet in length?

A. Yes, sir.

Q. The act of that is, by law devolves upon the Secretary of Commerce, does it not?

A. Yes, and collector of customs.

Q. Just to refresh your recollection on that, reading from the motor boat law, "The Secretary of Commerce and Labor shall make such regulations as may be necessary to secure the proper execution of this act by collectors of customs and other officers of the Government."

A. That is right.

Q. And "The secretary of the Department"—well, that is sufficient. Are you familiar with what regulations have been made?

A. I have them before me here.

Q. You know, then, if you have them before you, that the Department of Commerce, through the Bureau of Navigation, maintains five vessels called inspection vessels, to enforce the law?

A. Yes, sir.

[fol. 113] Q. None on this coast?

A. We use navigation inspectors here.

Q. What is a navigation inspector?

A. During the period from Decoration Day to Labor Day the Department of Commerce authorizes the Department of Customs to employ men to assist in the enforcement of the navigation laws, particularly the law that relates to the starting of motors on ferry boats before the boat is tied up and this act you referred to of 1910 and the number of motor boat—law of July 17, 1917, or any navigation law.

Q. Not having—what do they do, detail some of the local men for the time being for that, or send men from Washington?

A. The Collector of Customs generally appoints two people of the sea-faring fraternity. Last year, on account of the Customs inspectors not being too busy, we asked the

Department of Commerce to use them and they reimbursed their salaries.

Q. What do they do?

A. They board the boats to see we have life preservers, fire extinguishers, fog-horns and whistles and bells for instance, on the boat.

Q. You say they see if you have life preservers and also see if you have the kind required by Federal laws?

A. Yes, sir.

Q. Do they do that on any boat?

A. Any boat less than sixty-five feet in length, yes, sir.

Q. They also inspect that vessel to see if you have the right kind of lights, as required by Federal rules?

[fol. 114] A. No, all violations of lights have to be between sunset and sunrise. If they are doing it after sunset they inspect that.

Q. Wouldn't they see if you have the right light equipment?

A. No, because if the vessel didn't have light equipment you couldn't find them.

Q. Who looks at the lights?

A. The Coast Guard are charged with that, or Customs inspectors of launches or navigation inspectors of launches.

Q. How many Customs men have you in this district, in the Washington district?

A. There are 153 in Seattle and, I suppose, about 218 in the whole district.

Q. Mr. Dam, I understand that the Washington Customs district comprises all of the state of Washington except the north bank of the Columbia River. That runs to the big bend.

A. Well, the district of Washington has the state of Washington and the state of Oregon has the north bank of the Columbia River where it forms the boundary.

Q. Longview would be in the Oregon district?

A. Yes.

Q. So you have a very small part of the Columbia River part?

A. We haven't any of the Columbia River except where it leaves the state of Oregon.

Q. You say you have 153 in Seattle?

A. Yes.

[fol. 115] Q. And how many in the state at large?

A. About 218, I think.

Q. Now, Mr. Dam, any one of those you have mentioned, 218, or whatever it is, has the authority by law to board a vessel and check up on her?

A. Absolutely; anywhere in the United States.

Q. Anywhere in the United States four Marine leagues off the Coast, isn't it?

A. That is right.

Q. Mr. Dam, do you know how many Coast Guard vessels are maintained in this district?

A. No, I don't, but I imagine quite a few.

Q. You have a general idea of it, haven't you?

A. We have large Coast Guard vessels and a lot of small ones assigned to the principal ports.

Q. Those Coast Guard vessels can stop any vessel and inspect her for questions of whether she has got the proper fire apparatus?

A. They can inspect her for any law, any navigation law.

Q. Any navigation law, generally speaking?

A. Yes.

Q. That includes lights and pilot rules and fire extinguishers——

A. Pilot house rules, master of regular board of customs, and the name on the document and the number on the beam and the name on the bow.

Q. Aren't there about twenty-five of those vessels, counting the large and the small, in these waters?

A. I imagine there would be all of that.

Q. What books have you with you there, Mr. Dam?

[fol. 116] A. Well, I have the Navigation Laws of the United States by the Bureau for four years and I have all of the steamboat inspection books. This is the Laws of Steamboat Inspection published by the Bureau. In addition to that, I have — copy of the Act of June 7, 1918 relating to the relation of the Secretary of Commerce and the Act of June 10, 1910, relating to the equipment of motor boats. And I brought up sample copies of the various marine documents we issue, certificates and licenses, because I thought the Court might care to see them.

Q. Mr. Dam, are these blank documents documents we might keep without inconveniencing you?

A. Yes, I brought them for that purpose.

Mr. Robinson: I ask they be admitted in evidence, blank certificates of enrollment and registration and yacht license.

(Blank forms of enrollment, registration and license admitted in evidence as plaintiff's exhibit 1.)

Mr. Robinson:

Q. Mr. Dam, do you happen to know how many merchant vessels there are in the United States?

A. I believe it is 350,000. I have the exact number in the office, but I——

Q. Do you happen to know how many motor boats there are in the United States?

A. Well, I would imagine about 120,000, but I would have to give that as a guess.

Q. Do you happen to know how many vessels are in- [fol. 117] spected by the United States steamboat inspection service each year?

A. I would have that statistics in the office, but the steamboat inspectors would be in more with that.

Mr. Robinson: That is all.

Redirect examination.

By Mr. Baker:

Q. Just a moment, please. When you said that all these inspectors, all these Government officials, referring to Customs and Navigation inspectors, had the power to board a boat and check it up, you didn't mean to infer, did you, that they had the power to inspect for hulls and machinery on motor tugs, did you?

A. I did not. The only two inspections that we have are by the steamboat inspection service for vessels required to be inspected by law, and those vessels of 150 gross tons operated on foreign voyages outside this sheltered area.

Q. State whether or not these navigation officers or Coast Guards, if you know, have the power to require a motor tug under 150 tons to carry licensed officers.

A. Motor, you are referring to motor tugs, no.

Q. Yes.

Mr. Robinson. We concede they haven't.

A. No, they haven't.

Mr. Baker: If you will concede the navigation officers don't have the right to make regulations not provided by statute——

[fol. 118] Mr. Robinson: I will say they don't have power to require licensed officers on tugs, especially under sixty-five feet.

Mr. Baker:

Q. Do they have the power to require licenses on tugs and motor vessels over sixty-five feet?

A. No, they haven't any power.

Q. Do they have the power to require these navigation officers we have been speaking of, to require a certificate of inspection by any motor tug regardless of size, over 65 feet, but under 150 tons?

A. The only people that require certificates of inspection are steamboat inspectors. They have to inspect the vessels and if they don't have a certificate of inspection, any officer of inspection, Coast Guard or navigation inspectors, can make a report to the inspectors and fine them $500.00.

Q. Isn't it fair to say these men merely have the power to see these particular provisions of the statute are enforced, and don't have a right to make regulations not included in the statute?

A. They are working to enforce the statutes of 1915 and 1917, the Act of June 17th, 1897 requiring pilot rules, two copies of pilot rules to be posted and the section 4472, as amended, covering the operation of ferries or other vessels carrying automobiles where the automobiles are started before the vessel is made fast.

Q. One more question. Do you know whether or not, or state, if you know, your own knowledge, whether or not the United States Coast Guard has the authority to detain [fol. 119] a vessel for unseaworthiness without orders from Washington.

A. I would say they had to have orders before they could detain them.

Mr. Durham:

Q. You spoke a moment ago about inspection of motor vessels carrying passengers or freight. What is meant by the word "passenger"?

A. A passenger is any person carried who hasn't connection with the ownership, operation or management of the vessel; although, in some respects, a passenger is supposed to be a person that pays a fare.

Q. That applies to a person who is riding on the boat who has not paid a fare?

A. Yes, sir, that would be the case.

Q. Are you familiar with a publication known as the Marine Digest?

A. Well, I am familiar with it, but I seldom read it because I have so many Government publications to read, it takes my time.

Q. Do you know if that is a standard and accepted publication in the industry?

A. I know it is very popular in the sea-faring fraternity.

Q. You have not read its issue of March 2nd?

A. No, I haven't. It is around the office, but I didn't get time.

Q. Is it a general and trustworthy publication so it may be accepted as a quotation made by the Secretary of Commerce?

A. I would say so.

[fol. 120] Mr. Durham: I would like to have page 2 of the issue of the Marine Digest for March 2nd, 1935, containing an interview or quotation from the Secretary of Commerce, Daniel C. Roper, his official transmission to the Chairman of the Senate Committee of Commerce, a statement with respect to the necessity for proposed legislation pertaining to the Bureau of Navigation and the steamboat inspection.

Mr. Robinson: If the Court please, I haven't seen this newspaper article. Such matters as I want to get in with the Secretary of Commerce I have prepared in the proper way. I don't know whether it is material or not, even.

Mr. Durham: Do you want to take a look at it?

Mr. Robinson: Yes.

Mr. Durham: I ask it be marked for identification.

(Page 2 of the Marine Digest for March 2, 1935, marked for identification as defendant's exhibit No. 2.)

Mr. Robinson: I suggest you call another witness. I can look at this at the same time. Just a minute, Mr. Dam, I want to ask you a few questions.

Recross-examination.

By Mr. Robinson:

Q. Mr. Dam, did I understand you that you were the head of the Customs inspection service in this district?

A. The Customs service is divided in divisions, and I have charge of the Marine division.

[fol. 121] Q. If a Customs inspector, on boarding one of these vessels for his usual and proper duties of inspecting as to whether these things were being carried out, should discover that she appeared to be leaking or unseaworthy, would it be his duty to report that and, if he did report it, what would you do about it?

A. He could report that the same as any other matter that comes to his attention. He would go to the Collector of Customs and he would refer it to me to see if we had jurisdiction, and I would report we didn't; but we could report it to the inspection division for hulls and waters.

(Witness excused.)

Captain Daniel Hutchins, being a witness called on behalf of defendants, after having been first duly sworn, testified as follows:

Direct examination.

By Mr. Baker:

Mr. Robinson: The Court please, with reference to this page in the Marine Digest which has just been offered, I don't think the thing is material at all, and I don't want to admit its materiality, but counsel seems to want it in so badly that I won't formally object to it. I will argue there is nothing to it.

(Page 2 of the Marine Digest for March 2, 1935, admitted in evidence as defendant's exhibit 2.)

[fol. 122] Mr. Baker:

Q. Mr. Hutchins, you live in Seattle?

A. I do.

Q. You are in the employ of the Federal Government?

A. I am.

Q. In what capacity?

A. Acting local inspector of hulls, Bureau of Navigation, steamboat inspection service, Department of Commerce.

Q. How long have you occupied that position?

A. Two years, one month and 27 days.

Q. Well, will you explain your duties to the Court, Mr. Hutchins, as inspector of boilers, hulls?

A. Under title 3214 of the statutes, we are to determine the suitability of all vessels in regard to their safety, accommodations for the crew, to see they are suitably manned, to see officers and engineer officers are competent to perform the duties for which we license them, to see about the seaworthiness of vessels when they have a change of name, to certify able seamen, to certify and examine lifeboats, to ascertain the safety and accommodations and seaworthiness of vessels coming under our jurisdiction.

Q. Explain what your jurisdiction is relative to motor tugs.

A. Nothing. But when I say whenever a vessel is to have its name changed, we are required to examine the vessel and issue a so-called seaworthy certificate in order — the Customs may be properly informed of the identity of the vessel.

Q. Do you examine it for seaworthiness?

[fol. 123] A. We examine it to see it has the name and tonnage designated in the request and that it is afloat. We don't examine it for seaworthiness in the way of making an inspection of vessels coming under our jurisdiction.

Q. State whether or not you examine motor tugs' hulls for seaworthiness at the time they are first constructed.

A. No, sir.

Q. Do you have any jurisdiction—do you make any regulations?

A. No, sir.

Q. Do you ever exercise any authority over the number of men in the crew?

A. No, sir.

Q. Do you exercise any authority over the personnel, as to whether or not it is licensed, on a motor tug?

A. Do you mean do we determine the number of licensed men to man the vessel or whether we have authority over the men on the vessel holding a license?

Q. Is there any requirement on the part of your service that there be a licensed operator operating a motor tug?

A. Nothing.

Q. Do you know whether or not the Federal Government requires that there be any qualification as a condition precedent to operating a motor tug?

A. That I know nothing about.

Q. Now, will you—I was going to ask this question of Mr. Dam. Perhaps you can answer it for me. If not, I will ask him. Mr. Dam testified when a motor tug cleared for a foreign trip and after it left the waters of Puget [fol. 124] Sound as defined by the Port Angeles and Victoria area, a motor tug over 150 tons, it would be subject to inspection for certificate of seaworthiness by the American Bureau of Shipping. Now, as long as that particular tug, if it were over 150 tons gross, stayed within he areas of Port Angeles and Victoria, in that Sound area, would there be any requirement that that tug at any time be inspected for seaworthiness of hull?

A. Not that I know of. The inland waters of Puget Sound extend from New Dungeness and not from Port Angeles. Port Angeles is outside the pilot area of Puget Sound. So is Victoria.

Q. Will you kindly trace for us, as nearly as you can, where the dividing line runs?

A. I could only refer you to a pamphlet of pilot rules where you will see it defined in the blue book.

Q. Do you inspect tugs under forty feet?

A. All tow boats propelled by steam power. Regardless of hire or rent, towboats.

Q. State, if you know from your own knowledge, whether or not the Coast Guard service inspects motor tugs for seaworthiness of hull.

A. I know nothing about the Coast Guard.

Mr. Baker: I think that is all. You may examine.

[fol. 125] Cross-examination.

By Mr. Robinson:

Q. Captain, your service passes upon the sufficiency of life preservers and things of that kind?

A. Yes, sir.

Q. The Department of Commerce recognizes it?

A. With the exception of a ruling issued in our last circular relative to the motor boat act, which changes it from the supervision of the inspector we represent to any well qualified person, which is quite a difference, indeed. Who is to decide who a well qualified person is, I know not.

Q. You say in your testimony you don't have anything to do with motor tugs?

A. No, sir.

Q. And you are not prepared to testify about the regulations concerning motor tugs?

A. No, sir.

Q. And you don't wish to?

A. I don't know. I have all I can do to carry my own business in my head.

Q. I am just asking you that. Now, but you do have everything to say concerning steamboats?

A. Yes, sir. Subject, of course, to appeal.

Q. Yes. Now, Captain, if a man built a steam passenger vessel here to operate here, let us say between here and Shelton, he would come under your jurisdiction immediately she was commissioned?

A. Not if under sixty-five feet in length, except we would approve of the engine and boilers, giving them a letter of [fol. 126] approval, but make no survey of the hull.

Q. Make it sixty-five feet in length, then.

A. Then she is a motor boat. If propelled by steam, we have no jurisdiction; if by motor engine, we have.

Q. When does your jurisdiction begin with steam propelled boats?

A. Sixty-five feet and over.

Q. Assume this boat is sixty-five feet.

A. A fraction of an inch over sixty-five feet.

Q. Something over sixty-five feet.

A. Yes.

Q. Now, I presume that—when do you get jurisdiction over it?

A. Before they begin to build the boat, they draw up blue prints and specifications and we check them over; and when we object to anything, they take measures to correct it. That is the custom.

Q. Did you inspect her when she was being built?

A. Yes, in the course of construction we detail a man to check on the building to see if the building complies with the blue prints in our office.

Q. That would be if the boat were to operate between here and Shelton and not out of the waters of the State?
A. Yes.

Mr. Durham: We made objection to the testimony as to other boats than tow boats. Can it be understood that it runs to all the line of testimony?
The Court: Yes.
Mr. Robinson: My questioning is based on the theory [fol. 127] that the Act is so unconstitutional that it doesn't apply to Puget Sound; and we have to prove these things.
Mr. Durham: I just ask it apply to this line of testimony.

Mr. Robinson:

Q. You wouldn't want to know whether or not it was to go on under National waters; that is, whether or not it was going on waters of the United States?
A. Yes.
Q. Captain, you can help both of us if you will go along and tell us the things that would be under your jurisdiction on such a vessel.
A. A steel vessel over sixty-five feet in length carrying passengers. We first look over the prints and specifications and see everything is regular and up to the standards of our service. We o. k. it and, as construction goes along, detail a man to see the hull and machinery is installed according to the regulations of our service, to see the vessel is of a suitable character for the purpose for which it was built and navigated in safety and carry people safely; and that it carry accommodations for crew and that the crew is sufficient to navigate safely to all concerned. The principle purpose of our service is safety. We are not interested in the commercial end of it, although we are sympathetic. We know the vessels are not built for sport, but to make money, and we try to bring in the economic and safety in one way and protect our people and crews, and enlarge commerce.
Q. Such a vessel as surmised here would require a certificate of licensed officers?
[fol. 128] A. Yes.
Q. What would you require on that, just above the sixty-five feet?
A. Two second class pilots for a day; and I suppose two certified engineers; and we would require—if the vessel

is under 100 tons, she does not come under the able seaman's act, so would require at least three deck-hands.

Q. So you could specify the licensed officers and the crew she would be required to carry?

A. Yes.

Q. Would you have jurisdiction over the life-boats?

A. Yes, sir. She would have to carry life-boats, depending on the routes. If only three miles from shore, she would have to have ten percent of the people carried and, if further than that, thirty percent; if built to navigate the ocean, boatage and raftage for everybody carried; and if the deep shore, have to have boatage for everybody aboard.

Now, the character of those boats are standardized by our service and before life-boats are passed, they must be planned and blue print submitted to our service and approved, the construction of the boat looked after and the stability of the boats tested, and we give the o. k. to it, and the number and plan is attached and it is passed as a life-boat.

Q. The Board of supervising *of* inspectors covering bays, sounds and lakes, I presume, covers Puget Sound?

A. Yes, sir.

Q. Do you recognize that as the reprint of them?

[fol. 129] Yes, sir.

Q. These are giving the force of law to the statutes, are they not?

A. With this exception, they may be suspended or amended if sufficient reason is offered by committees of supervising inspectors. They have not the force of statutes because the statutes, as you know, cannot be changed by any inspector, but those rules and regulations are subject to amendment.

Q. The statute provides that they shall be made and must be obeyed and there are penalties for not obeying?

A. Yes, sir.

Q. You were speaking of life boats. I find in the regulations there is a page, over a page, for life-boats on every possible detail.

A. Yes, sir.

Q. And these regulations go into the same detail about life preservers?

A. Yes, sir.

Q. Even to the make of them they may use?

A. Yes, sir.

Q. And the same thing is the case about all sorts of fire prevention equipment used on vessels?

A. Yes.

Q. As a matter of fact——

A. Pardon me, not the same with fire prevention equipment. We list the standard ways recommended by the Bureau of Standards.

Q. Six or seven pages of lists, what they approve?

A. Yes, sir.

[fol. 130] Q. They must use only those kinds?

A. Yes.

Mr. Robinson: This, of course, is not a matter of evidence as much as it is a law book, but I ask to put it in because it is not always obtainable readily.

Mr. Baker: We have no objection. We stipulate, if you like, that is an authorized copy.

Mr. Robinson: I would like to retain it for the present. I will offer it later.

Mr. Robinson:

Q. Such a vessel as we described, you would go over annually and inspect all these matters?

A. One other thing, if she carried fifty people or more, we require a stability test that requires a man from Washington, D. C., to see she is stable and won't upset. We have authority to require a stability test on any vessel in our jurisdiction if we suspect her of being unstable.

Q. Captain, is there anything else you think of with refcrenee to a passenger vessel?

A. Well, just what do you mean? I can think of plenty of things.

Q. Now, authority you haven't mentioned.

A. If we have a complaint the vessel is unsafe, we go down personally, the inspector of boilers and inspector of hulls, and assistant inspectors, and give the vessel a general dusting, as we say; and if we find the claim is well founded, we give them notice they must remedy it and, until it is done, withdraw the certificate of inspection.

[fol. 131] Q. As to steam tugs, you have practically the same power?

A. We inspect steam tugs for the protection of the crew, to see the crew is safe and have suitable accommodations.

Q. And suitable fire prevention equipment and life preservers and that sort of thing?

A. Yes, even seeing if water tanks are in condition to have healthy drinking water.

Q. You have already told us you have no authority over motor tugs. Will you tell us what authority you have over any motor vessels?

A. The only authority we have over motor vessels under 15 gross tons, carrying passengers for hire, is this: they might carry an operator and the operators are licensed by our service and several of the operators have at times raised the question, due to the fact the operators are under the jurisdiction of our service, we could have those vessels inclined for their stability because the operator is responsible to our service. That is all the jurisdiction, you might say, we have over motor vessels under 15 gross tons.

All over 15 gross tons and less than 15 feet in length, controlled by the motor boat act to prevent collisions at sea and to determine the equipment on these vessels. The hull itself, so far as its seaworthiness was concerned, was not touched on in that act. That motor boat act requires us to license that there is no examination and no age limit. I have had boys 15 years of age come into our office and ask for a- operator's license and we have refused. The Bureau wrote and wanted to know under what authority [fol. 132] we had refused the age and we had to fall back on the old stand-by they had not reached the age of discretion. I have watched 250 people come off a motor boat in Tacoma one Sunday afternoon that is not inspected by our service except a letter of approval when we approve the engines and boilers. After that, we have nothing to do with it. It was not within our province to require a stability test or anything else to protect the people. What protection they had on that particular vessel, I know not.

On the other hand, if the vessel is towing logs we have to give it a regular inspection. That is the incongruity of the motor boat law. Diesel boats and pleasure boats, we have nothing to do with them, unless they are steam yachts. You can own a Diesel yacht 200 feet long and we have nothing to do with it. You could put a blind man on to pilot it and an imbecile to man it and go down the Sound and cut into a boat and drown people and we have nothing to do with it. I am answering your question. We have nothing

to do with fishing vessels. We have fishing vessels in Seattle, hundreds of tons and carry many people, but because they are oil vessels, we have no authority. If it is a steam vessel, we have. Motor vessels over 65 feet in length and over 15 gross tons must have the same fire and life saving equipment as all other passenger vessels, but beyond that, the authority of this service is limited. It is not as free as it is in steam vessels. It is only in the last few years we have been able to name the crew on these vessels. [fol. 133] For instance, one of the ferry boats was a steam vessel and it didn't have a pump large enough to throw a stream up to the upper deck. Up to that time we had no authority to remedy that. I think it is since 1927 we had that authority.

On another occasion, there was a ferry boat in Tacoma carrying 30 and 40 people, which had bottles of Flamo gas, and the book on the desk shows Flamo shall not be carried on vessels carrying passengers. Yet when we ordered it off, the operator was willing, but the manufacturer of the boat objected, notwithstanding he was told that if it exploded it would blow the vessel to smithereens. I am not sure we have the authority to do it but we have the cooperation of the operators. It is not a question of the law, but we put it up to the operators. We have no trouble with the operators of the ferries. They do everything we request them to do. That is the answer to your question.

Q. I am not sure I understand you correctly. Do I understand that, on vessels above 65 feet, driven by heavy oil engines, carrying passengers, you have substantially the same power with life saving equipment as with steamers?

A. Yes, sir, we have the same. The law says they shall have the same fire extinguishing equipment and life saving equipment that a steam vessel has.

Q. How about a freight vessel, not carrying passengers?

A. If over 15 tons, we inspect her. I have heard remarks they questioned our authority, but are glad to have the vessel inspected.

[fol. 134] Q. Do you issue a certificate of authority?

A. We do. We have never had the question from the Bureau, but the remarks of operators.

Q. I noticed the other day, looking over some of these reports, the number of motor vessels and steam vessels

showed one at Hoquiam 22 tons. What would that be, a passenger vessel?

A. 22 tons?

Q. I think so.

A. I wouldn't care to answer your question. I know nothing about conditions at Hoquiam. That is another district. There is another board of locals down there.

Q. Then the big thing is in tugs?

A. I don't know.

Q. I mean in the question of inspection.

A. Well, fishing vessels. We have fishing vessels carrying many hundred people. They fill up and there is nobody to inspect conditions there, inspect health, seaworthiness and fire, or anything, except underwriters with insurance policies.

Q. There is hundreds of those vessels?

A. I am speaking of the large ones, vessels to carry quite a number of people.

Q. Captain, do you have in mind how many vessels are inspected in the United States by the steamboat service?

A. I can't remember. You can get the information from the report of our Director to the Secretary of Commerce.

Q. I have it here. I thought perhaps you remembered it. Now, I have learned a considerable—I have been over this before but, if I understand you correctly, on motor vessels [fol. 135] of 65 feet and over 15 tons, whether carrying freight or passengers, your authority is substantially as broad as in any steamboat?

A. I wouldn't say 100 percent. That is a question yet to be definitely settled.

Q. But it is pretty largely so? It is over the boat and the life saving equipment and fire extinguishing, and so forth?

A. And the seaworthiness of hull, yes. Pleasure yachts and fishing vessels and tow boats, those are the three vessels propelled by heavy engines over which we have no jurisdiction.

Q. You know in a general way the Government has certain regulations and exercises supervision, but not through your department?

A. Yes.

Q. Through other channels?

A. Yes.

Q. I will not inquire as to that. Captain, in your position, you not only issue licenses, but it is also one of your duties to see that they are obeyed or, at any rate, if they are claimed to be.

A. We investigate accidents and see if the licensed man is responsible for the accident, and if we find him culpable after the investigation and trial, we take measures we think is prudent. Our decision is subject to repeal. We can suspend his license and also report him to the United States District Attorney if we feel it is criminal. It is subject to appeal to the supervising director, to the director and the Secretary of Commerce.

[fol. 136] Q. It has to be approved by the Secretary himself before the man's license can be taken away?

A. If he wishes to appeal.

Q. He is to have notice of a trial and appear by counsel?

A. Just the same as the United States Commissioner.

Q. To do that, you have to be familiar with the regulations concerning the steering and sailing rules and navigation rules?

A. I have means of posting myself. It is not necessary to keep it in mind all the time.

Q. I want to read you a little language from this Act we are talking about here, and I will say to counsel I am reading from rule 8, the second: "When two steam vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other." Does that sound familiar to you?

A. It certainly does.

Q. That is one of the rules prescribed by the Federal Government, is it not?

A. Yes, sir.

Q. The exact language.

A. Are you reading from the pilot rules?

Q. The State law of Washington, 1907, with the idea of finding if it didn't take the rules right out of the Federal rule.

A. Mr. Robinson, I formerly memorized the rules of the road, but I don't remember them now; but the pilot rules have not the force of the rules of the road. Is that the pilot rules or the rules of the road? There is quite a difference.

[fol. 137] Q. This is the Washington law. It doesn't say what they are.

A. That word there, "steamboats" is not in our vernacular. We say vessels. This shows it is not an exact——

Q. Well, look at, say 2, 3, 4 and 5 there, under section 8. Those are paragraphs lifted right out of the Federal rules, aren't they, pilot rules?

A. I wouldn't care to answer that question directly. I would say that number 2 is probably. I don't affirm it. I say it probably is. But number 3 doesn't look so familiar. I think there is a little change in the language there.

Q. All right. I will read you this one. "Signals of distress shall be four distinct blasts of the whistle, and shall be recognized by the Master of any steamboat hearing the same, and he shall render such assistance as is in his power."

Mr. Baker: I don't see the materiality of these questions. It must be remembered that the jurisdiction of the State of Washington under this Act is not restricted to the waters navigable, but also apply to the waters land-locked, where they run steamboats; so the tender of these questions has no significance as to the issues involved herein.

Mr. Robinson: The Court please, at the argument on the demurrer, I insisted that one of the reasons for bringing the action, and one of the reasons I insisted the subsequent exceeding authority, they were misinterpreting this Act [fol. 138] to apply to Puget Sound when it was made to apply to Lake Chelan. It is my duty to show this act, from one end to the other, is unconstitutional as applied to Federal waters, and I have to show what the Federal law is in order to do it. That is the heart and front of my case.

The Court: I think you may make that showing. It occurs to me, however, that just simply copies of the Act would be sufficient.

Mr. Robinson: There is one or two cases. I am going to adopt that idea. One or two cases they are in conflict and I want to bring out.

Mr. Baker: That is a matter of interpretation for the Court, and not the contention of Mr. Robinson. I can't see questions asked of the witness of what the law is and the law in its shape and form as presented in the statutes of the State of Washington and the Federal statutes. The best evidence is the law itself, and the interpretation is to

be made by the Court. Mr. Robinson is attempting to make the witness assume judicial functions, thereby passing on whether or not the laws are the same.

Mr. Robinson: I am telling counsel I expect to abandon this, but Mr. Hutchins knows more about this than any of us; otherwise, we would have to dig it out.

Mr. Durham: The Captain said he was not familiar with *the* the pilot rules.

[fol. 139] Mr. Robinson: I guess he knows if four blasts of the whistle is right on Puget Sound or not.

The Court: He may proceed.

Mr. Robinson:

Q. That is the lawful signal?

A. That is one of them. The distress signals are the same as in the international rules of the road. I think it is article 31.

Q. There are one or two things I want to ask you here.

A. Blasts of the whistle or flags. Unusual noise of the fog whistle where the firing of a gun is a distress whistle.

Q. There is a section of the law reads: "Every ferry boat propelled by steam or electricity shall be provided with at least one substantial boat 15 feet or more in length, and properly supplied with oars, and kept tight and in good condition at all times, and so attached to such ferry boat that it may, in case of need, be launched into the water for immediate use. Every steamboat or vessel propelled by machinery and carrying passengers shall be provided, if of the measurement of 250 and less than 500 tons burden, with at least two substantial row-boats, with life-lines attached and properly supplied with oars, and kept tight and in good condition at all times, and so attached as to be capable of being launched into the water for immediate use in case of need; and if of the measurement of 500 tons or more, with at least one first class life-boat and one row-boat 25 feet long by 7 wide."

Now, of course, that is tonnage here where some of your [fol. 140] regulations go to length.

A. No, sir, our regulations go to size. We have life boats at certain capacity according to the tonnage of the vessel; that is,—(interrupted)

Q. Are you able to say whether a boat so outfitted would answer your rules, be sufficient?

A. No.
Q. It isn't sufficient?
A. No.
Q. It doesn't come anywhere near it?
A. No, nothing of the kind, in our rules.

Mr. Baker: I want to make an objection. It seems to me Mr. Robinson is going so far beyond the allegations of the Complaint to confuse it. Nowhere is there any allegations of the rules and regulations he is interrogating the witness on relative to the ferry boats and things of that sort. We are dealing with a situation involving tug boats and tug boats only. The law, if constitutional, must be held constitutional to tug boats only. The law is settled, he who is not affected by a law can not challenge its constitutionality only insofar as its constitutionality affects him. That is so well established, you can't change it. He has to prove the unconstitutionality insofar as affects tugboats and his plaintiffs who are all tugboat operators. We disclaim any intention to regulate any steamboats and we are interested only in motor boats, and I think that if we keep the [fol. 141] issue in this case clear only insofar as we restrict our testimony and our questions and our arguments confined to tugboats; otherwise, we would get into a mess nobody is going to understand.

Mr. Robinson: We might settle this now, then.

(Argument.)

The Court: I think, as I have indicated before, I am not going to restrict either party in this case to what I think the record should be, but I am going to allow you to develop the record so that you can present your theory, not only in this court at the conclusion of the case in argument, but will not be curtailed in any way by the appellate court.

Mr. Robinson: Very well. I think, perhaps, counsel don't understand my position, but I ought to tell them what it is. The suit is brought under the statute concerning prohibition. I say that these three subsequently are exceeding their authority, that the only authority they have got is not on inland waters, but the land-locked lakes, and they are assuming to extend it to the Federal waters, and I say in that, that, if I can show page after page of their law which can't constitutionally apply to Federal waters, I sustain my main point; and it is directly in point and directly

[fol. 142] material; however, I will do that by reading the law and not questioning Captain Hutchins much further.

Q. Mr. Hutchins, all tugs of any kind have to have life-preservers aboard, do they not?

A. I don't know what motor tugs have to have aboard.

Q. You know the motor boat law, don't you? At any rate, do you know there is a life-preserver description, "Two inches thick and twelve inches wide, with lines properly attached in such manner as to be convenient for use." Do you know of any such description of life-preserver under Federal law that would be permitted?

A. No, sir. We have balsa wood life-preservers.

Q. Just one or two questions more. You license engineers for those sort of motor vessels required down to first assistant, do you not?

A. I would defer that to Mr. Campbell.

Mr. Robinson: I think that is—just a minute.

Q. Captain, you don't assert any authority over any vessels of any kind that navigate land-locked waters, by which I mean waters from which there is not an outlet to the oceans?

A. Only lakes between two states; lakes between two states or between two countries. We inspect Waterton Lake between Canada and Washington, and Lake Tahoe between California and Nevada.

Q. If it is in one state and no outlet to the ocean?

A. We have no jurisdiction, only on the request to the Bureau, we would be requested to confer with builders of vessels for those waters.

[fol. 143] Q. In an advisory capacity?

A. Yes, sir.

Redirect examination.

By Mr. Durham:

Q. I think you said you had some jurisdiction over motor vessels over sixty-five feet in length, carrying passengers.

A. Yes, sir, on waters that are subject to inspection, not Lake Chelan.

Q. That is understood in all these questions. What do you mean by passenger?

A. Any person carried on the vessel not connected with the owner or the operation of the vessel, a general passenger.

Q. Would that include stevedores or longshoremen carried in connection of the company's business?

A. That would depend on the arrangements made for the carrying of those people.

Q. If carried for hire.

A. We don't allow them to carry stevedores unless it is in the certificate, or issue an amendment.

Q. Do you inspect any tugboats in your territory on the ground they carry passengers?

A. We inspect a few tugboats and insert in the certificate a clause to carry some stevedores when desired. We are very zealous about putting that out. As far as I know, only one vessel carries that now.

Q. What vessel is that, do you recall?

[fol. 144] A. I can't remember.

Q. Do you remember who it is owned by?

A. No, I don't remember.

Q. Aside from this one vessel, you don't inspect any vessel?

A. I am speaking of steam tugs. We don't inspect any motor tugs.

Q. Was this vessel you said you inspected because it had passengers a steam tug?

A. Occasionally when a fleet comes to Seattle, vessels are engaged in carrying sight-seers from the shore to the ships and when the occasion arises, in the interests of public safety, we assume jurisdiction over these vessels, see that they have sufficient life-preservers and fire equipment and, in general, safe for the carrying of people for hire, but it is questionable if we have that authority directly under the law. It is something we assume for the public emergency.

Q. You don't claim legal authority to do it?

A. We have, but how much I am not prepared to say. In our business, in administering the law, if we have any doubts as to our position, we confer with our superiors.

Q. The towboats, motor towboats on Puget Sound and in the waters of the state of Washington in your jurisdiction are none of them inspected by you now, are they?

A. No.

Q. Now, you spoke of an operator's license being required for a certain class of vessels. An operator's license you issue without examination. What class of vessels, for what class of vessels is this operator's license required?

[fol. 145] A. Operator's licenses are required by the men in charge of vessels carrying passengers or freight for hire over 15 gross tons and over 65 feet in length, and vessels under 15 gross tons carrying passengers for hire.

Q. That is passengers for hire?

A. Yes. That for hire is superfluous.

Q. There is no operator's license required for the operator of a motor driven tug boat?

A. Not that I know of.

Q. Certainly none that this provision with relation to not requiring an examination refers to?

A. Not that I know of. An operator doesn't even have to have a color test. That is up to the company.

Q. The operator's license which the law says there shall be no examination for, that operator's license is one that is issued by you and applies to that class of vessels you have mentioned?

A. You mean under 65 feet and over 15 gross tons? Yes, sir.

Q. Does that section, there shall be no examination for an operator's license, has no relation whatever to motor driven tugboats?

A. Not that I know of.

Mr. Robinson: I will concede that.

Mr. Durham:

Q. As I understand, the exhibit that you have identified and which Mr. Robinson has, I don't believe it has been numbered yet.

Mr. Robinson: I shall have it numbered.

(General rules and regulations admitted in evidence as plaintiff's exhibit 3.)

[fol. 146] Mr. Robinson: In order to complete the record

Mr. Durham: You are putting these witnesses on for direct. Plaintiff's 1 is your exhibit and 3 is your exhibit. I would like the record to so show.

Mr. Robinson: To finish it up, I ask the Captain to say if he recognizes that as form 804 of pilot rules for inland waters.

I ask to put this in also.

(Pilot rules for certain inland waters admitted in evidence as plaintiff's exhibit 4.)

Mr. Baker: There would be some considerable question. I don't know whose witness he is.

Mr. Durham: Counsel said he would be considered on these witnesses as direct on both parties.

Mr. Robinson: I am willing to take him any time.

Mr. Durham:

Q. You are very strict in regard to the vessels under your jurisdiction with regard to their operation on Puget Sound?

A. We are conscientious to see the law is observed as we see it.

Q. On Puget Sound are many traffic lanes of ferry boats and passenger boats going in all directions, are there not?

A. I will say yes, inferring, of course, what your question means to my point of view. Traffic lane on the water is hardly traffic routes.

Q. Well, say traffic routes criss-cross in all directions on the Sound.

A. Yes, sir.

[fol. 147] Q. Thousands and thousands of people travel across the Sound every day?

A. I would think so, from examination of our records.

Q. And many, many boats go in every direction?

A. Yes.

Q. Fogs are very prevalent on the Sound in certain seasons of the year?

A. Yes.

Q. There are a great many tide rips and menaces to navigation on the Sound?

A. Well, I would hardly couple the two together. There are tide rips and there are menaces to navigation.

Q. It takes quite a skillful man to navigate a ship on Puget Sound?

A. I would say an experienced man.

Q. One who knows the directions and the rate of the tides and the contours of the numerous harbors and bays there are?

A. He should have a certain amount of knowledge of that kind. I wouldn't say he must know those things.

Q. He must know those things if he is to navigate a vessel successfully in the fog?

A. Safely.

Q. Now, you have no jurisdiction whatever, I think you said, of pleasure, fishing and towboats, motor driven?

A. Propelled by heavy oil, gasoline or such conditions.

Q. This exhibit I have identified, I think you have made out, and I would like to make it clear that it differs from a statute of these statutes that you have authority to alter when occasion arises.

[fol. 148] A. It is questionable if a man is operating an uninspected vessel under the authority of the license. If Tom Smith puts John Brown to work on his uninspected ship because he holds a license, it is a question whether we have authority over that individual in case he made a mistake, in case he was culpable in any way. If a man went out on an inspected ship and was given the position because he had a license, and drowned a number of people because he had, I would say we should step in.

Q. Would you have authority to drop his license?

A. It is questionable.

Mr. Baker:

Q. In order to get this situation clear, I want to put this one question to you. Regardless of tonnage of a motor tug, whether it be over 100 tons and over 65 feet, or under a hundred tons and over 65 feet, you have no authority to inspect that tug for seaworthiness of hull, is that right?

A. Unless he wanted to change her name.

Q. Then your inspection to be for what?

A. To identify the vessel, number and tonnage, and see she is afloat.

Mr. Baker: That is all. You may examine, Mr. Robinson.

[fol. 149] Recross-examination.

By Mr. Robinson:

Q. A little while ago you raised the question of licensed men working on uninspected vessels. That happens quite frequently, doesn't it?

A. I don't know. I wouldn't care to answer the question on hearsay.

Q. As far as you know, that may happen?

A. It may; it is possible.

Q. All vessels are, report accidents to the Customs, don't they?

A. All vessels report accidents to the Customs within a period of five days. I understand there is blanks furnished for that purpose.

Q. All licensed operators must report accidents to you?

A. Yes, and to the Customs office.

Q. You are posted to what accidents occur at sea in your locality?

A. I wouldn't care to define my own capability. That is for you to say, or somebody else.

Q. You hear of any serious marine accidents that happen on Puget Sound, don't you? I mean resulting in loss of life?

A. Yes, we hear of it, but we don't hear of all of the accidents.

Q. I mean serious accidents resulting in loss of life.

A. We are supposed to.

Q. You do, don't you?

A. I think so.

Q. You have been some two years in your own position?

[fol. 150] A. Yes, sir.

Q. What before that?

A. In a subordinate position to the one I occupy now. I would like to put in the—for fifteen years. I would like to put in the record I have received the same remuneration for the last two years, one month and seventeen days as I received before that.

Q. Captain, can you recall any serious loss of life in a tugboat accident in Puget Sound recently, within four or five years?

A. I don't think my memory is clear enough to answer your question, Mr. Robinson.

Q. You recall the loss of the Warren, don't you?

A. I remember hearing something about it.

Q. She was lost up around Protection Island somewhere. She was a motor tug, wasn't she?

A. I believe she was.

Q. Do you remember the loss of the Bahada?

A. I remember about a vessel named Bahada.

Q. She was an inspected tug, wasn't she, a steam tug?

A. I couldn't answer your question definitely, but I think she was. You see, Mr. Robinson, I have to carry so many important things in my mind that these things of the past, I depend on going to the source of the information to refresh my mind.

Q. I will ask you this, then I can prove it by others. Would you say there was any substantial loss of life in tugs in Puget Sound the last five or fifteen years?

A. What do you mean, substantial?

Q. More than four or five men?

[fol. 151] A. I don't know.

Mr. Baker: What is your standard of loss of life?

Mr. Robinson:

Q. Can you tell me of any loss of life other than the Bahada and the Warren in the last five years?

A. I couldn't answer the question without thinking fifteen minutes or so. So far as I can remember——

Q. You see what I am after?

A. Yes.

Q. Counsel was trying to enforce on you the great dangers of navigating, and I want to know if anyone was killed.

(Witness excused.)

(Whereupon a recess was taken for fifteen minutes. Upon reconvening, the following proceedings were had:)

[fol. 152] Mr. William M. Campbell, being a witness called on behalf of defendants, after having been first duly sworn, testified as follows:

Direct examination.

By Mr. Baker:

Q. Your name?

A. William M. Campbell.

Q. Your position with the United States Government?

A. Acting local inspector of boilers.

Q. For how long have you been the inspector of boilers?

A. Inspector of boilers? I have been inspector of boilers for almost eighteen years, but my present position is two years the first of this August.

Q. Will you explain your duties to the Court, please?

A. My position is to supervise the manner the reports of the inspectors of boilers, whether or not there is any defect and, if there should be defects, the approval of their repairs; also the shafting of the engines. In fact, any defect regarding the mechanical end of the ship comes under my supervision.

Q. What vessels do you inspect, Captain, or do your men inspect?

A. The steam vessels we inspect; and also a limited amount of motor vessels. Very limited on motor vessels.

Q. Which motor vessels do you inspect?

A. Motor vessels over 15 tons.

Q. Do you inspect tugboats?

A. Motor towboats?

Q. Yes, motor towboats.

A. No.

[fol. 153] Q. Of any sort and character?

A. None whatever.

Q. Does it make any difference whatever as to the size of the tonnage?

A. Absolutely not.

Q. State from your own knowledge whether any branch of the United States Government inspects the machinery of motor towboats for the purpose of ascertaining the fitness of any machinery used in propelling such motor towboats.

A. I can't speak as to the regulations of any other branch of the service, of the Bureau.

Q. From your own knowledge, are you able to tell whether or not tanks, other equipment, machinery used in the tug-

boats, are of such dangerous nature as should require inspection?

A. Vessels over 15 tons we would inspect the boiler if there is any on it, and also the pressure vessel.

Q. Let me restrict the question to tugboats.

A. I understand that.

Q. That is, motor tugboats, not steam?

A. Exactly.

Q. Your answer was what?

A. Boilers of motor vessels over 15 tons that have a boiler, and also pressure vessels; that would be compressed air tanks.

Q. I don't get this exactly clear. As I understood you to say, Mr. Campbell, that under those circumstances, do you inspect motor tugboats or their machinery?

A. Certainly not.

[fol. 154] Q. My question was, from your general knowledge of machinery used in operating boats, whether or not you think there is any necessity from the standpoint of whether or not machinery is potentially dangerous, for the inspection of machinery used—or let me withdraw that question, first, and get to it this way:

Are you familiar with the type of machinery that is used in the propelling of motor tugboats?

A. Yes.

Q. All right. Now, will you state for the Court whether, in your opinion, the type of equipment and machinery contrivances used in the propelling of these boats is such that there is any necessity for inspection?

A. I can only give my personal opinion, Your Honor. We have no regulations on that.

Mr. Robinson: If the Court please, not at all inferring any feeling that Mr. Campbell is not qualified, which you assume he is, I object to the matter as immaterial. The question here is a question of what has been done, not what ought to be done. What ought to be done is a question that is decided by Congress and not by this gentleman and the opinion is entirely irrelevant.

The Court: I am inclined to agree with the objection. It seems to me the question being tested here is whether a law that has been passed is constitutional and the question that you have asked is one going to the wisdom of the law, in which the Court isn't concerned.

[fol. 155] Mr. Baker: I understand at the present time you make no contention that the statute of 1907 is questioned here, passed by the Legislature of that time, is not objectionable by reason that it is arbitrary abuse of the police power and isn't founded on any just and due exercise of the police power on that ground.

Mr. Robinson: No, and I am even willing to say I think you have a right to show the necessity of this thing if you desire to do so, but I didn't think this gentleman's position with the Government was such his opinion would be of much— I withdraw the objection.

Mr. Baker: It is all right. All I want to understand is that, regardless of its constitutionality on other grounds, you don't contest it on the ground it is not a fair and due exercise of the police power.

Mr. Robinson: No.

Mr. Baker: And for the purpose of making our position clear to the Court, we do not believe—this explanation as I am now giving it is suggested to me, the necessity of it is suggested to me by reason of what the Court just said as to what the Court considers the purpose of this proceeding.

It is our contention that the constitutionality of the law is not involved because, in any event, this statute applies to land-locked waters. Our conception is this, that the [fol. 156] law operates in two phases. As to steamboats in land-locked waters, all these provisions that Mr. Robinson referred to, which, to him conflict with the Federal Government provisions, they apply only to those particular jurisdictions exclusively within the jurisdiction of the State, the land-locked waters; but as to the other provisions of inspection which do not conflict with the provisions of the Federal Government in her proper exercise of the police power, upon that scope of the field that the Federal Government does not cover.

The constitutionality of the statute is not involved. It is a question of whether or not the statute, in certain instances, conflicts with the Federal statute in those instances. It is suggested that the Court could hold it applied only to the jurisdiction of the waters in the state.

The Court: I understand that.

Mr. Durham: It is our opinion, also, that the law is unquestionably constitutional; that it is in the power of the

state to legislate on landlocked waters; that, as to any conflict with the Federal law, if any, on Puget Sound and waters of that character, the law could not be invalid but, under the interpretation of our own Supreme Court in State versus Ames, 47 Wash, 328, the law would be only inoperative to that extent.

[fol. 157] They used the words there "inoperative to that extent". That is the position on behalf of the client I represent.

Mr. Baker: No further questions.

Mr. Robinson: Of course, those questions could be answered only by those books piled on the desk there.

Cross-examination.

By Mr. Robinson:

Q. I think you should tell me a little more accurately about the licenses issued to motor vessels. What grades of license are issued?

A. We issue one license on tonnage and on those limited to one engineer. And one, two and three engineers. And also have a chief engineer of 300 ton and first assistant engineer of 150 ton. The local inspectors are authorized to designate on the license the tonnage they consider the man qualified to fill.

Q. What is the lowest tonnage covered there? Let me put it another way; the lowest license would go up to what tonnage?

A. The lowest would probably be 10 tons.

Q. Well, suppose a vessel carrying passengers or freight of a couple of hundred tons, and they are a motor driven vessel, what license men would she have, a vessel over 200 tons?

A. A chief engineer of 200 tons would cover the vessel.

Q. She would require no other license in the engineering department?

[fol. 158] A. Chief engineer of 200 tons would cover a 200 ton vessel.

Mr. Baker: Are you referring to motor vessels?

A. 10 ton. I am referring to steam vessels. I said 10 ton, that refers to a steam vessel.

Mr. Robinson:

Q. I understand you don't license for tugs, but the biggest tug we have got here is about 400 tons. I know you don't license for that, but suppose you had a boat of the motor kind you do license, what license then would you require in the license department?

A. Do you mean the number of——(interrupted)

Q. Yes.

A. The chief engineer, and it would depend on the run. The chief engineer and one assistant engineer, and two oilers if it was on Puget Sound, providing the vessel was running over thirteen hours in any one day. If it should run less than thirteen hours a day, one engineer and one oiler is all that is necessary.

Q. What is the requirement of the chief engineer of a vessel like that?

A. It would require three years experience in the engine department of a motor vessel. That would be an oil vessel. He would require three years as an oiler in the engine department for a license as chief engineer of 400 gross tons.

Q. What would a third assistant engineer have to have in experience, in Puget Sound?

A. That would be three years.

Q. On some kind of a motor driven vessel?

A. Yes, sir.

[fol. 159] Q. That is, if he was on some tug, motor driven, that would count as time for his experience?

A. That would count.

Redirect examination.

By Mr. Baker:

Q. You were talking only of licensed engineering personnel?

A. That is all.

Q. And all remarks you made had no bearing upon tugboats, motor driven tugboats?

A. Just repeat the question.

Q. The testimony you just offered in response to Mr. Robinson's questions had no bearing upon motor driven tugboats?

A. They are not required to have a license from our department.

(Witness excused.)

[fol. 160] Mr. Baker: At this time I would like to offer in evidence, by stipulation with Mr. Robinson, some questions that were propounded to the Coast Guard and an answer from the officer of the Coast Guard, R. W. Dempwolf, Captain of the U. S. Coast Guard in Seattle. The officers couldn't come down here because I was informed too late to secure the authorization from Washington that they would have to have, so, by agreement, it has been stipulated that this can go in as evidence.

Mr. Robinson: I have agreed to waive the rule of evidence and permit you to put it in.

(Letter admitted in evidence as defendant's exhibit 5.)

Mr. Robinson: May I resume my investigations?

Mr. Baker: Yes, pardon me.

FRANK HUBBLE, being a witness called on behalf of plaintiff, after having been first duly sworn, testified as follows:

Mr. Robinson: Mr. Baker, I understood you to say you wanted Mr. Hubble to remain here. You can have him now.

Mr. Baker: I wanted to ask one question.

[fol. 161] Cross-examination.

By Mr. Baker:

Q. I have a letter here, Mr. Hubble, that is addressed to the United States local inspector of boilers, signed by George Graw, purporting to come from the Allman-Hubble Tugboat Company. It is a copy of the letter. I hand you this letter and ask you whether or not the original of that was sent to the United States inspector of boilers, I think, steamboat inspection service.

A. I suppose it is, yes; who copied it?

Q. I don't know. This was given to us by the office.

A. It isn't on our stationery.

Q. This letter says as follows: "Please be advised that our tug 'Ranger' has been made a Diesel tug, so we are not up for inspection." Addressed to the United States Inspector of Boilers, Boat Inspection Service, Seattle, Wash-

ington. At the time, this was written by your authority, was it?

A. Well, it is a long time ago. I suppose it was.

Q. Dated August 5th, 1926.

A. We have changed the steam to Diesel. That is the only reason I can see for it.

Q. Was the purpose of changing the type of motivation power at that time for the purpose of escaping from the Federal inspection service?

A. No.

Q. But you did know, however, if you did change the type of engine or machinery used for propelling the boat, you—that is, if you put in a motor instead of steam, you would be no longer subject to the steamboat inspection service?

[fol. 162] A. I would know that, yes, but the reason we made the change was the boiler went bad and we had to make a change, and we changed to Diesel.

Q. I am getting at, was it your impression that motor tugboats were not subject to inspection by the United States officials?

A. The change was made, as I said, because the boiler went bum and I think she wasn't subject to inspection.

Mr. Durham:

Q. As soon as you changed those to a Diesel tug, did you reduce the personnel on the boat?

A. No, we had the same amount of men on the Diesel rig we had on the steam. That is, the same amount that the Federal inspectors called for. If she called for three men, we still had three men on.

Mr. Baker: We will offer this in evidence.

Mr. Robinson: Is there any use putting it in, in view he admitted the change was made?

Mr. Baker: No, it is read in, anyway.

Redirect examination.

Br. Mr. Robinson:

Q. Mr. Hubble, you are of the Allman-Hubble Tugboat Company?

A. Yes, sir.

Q. That is a Washington corporation?

A. Yes, sir.

Q. Are you an officer?

A. Yes, sir.

Q. What officer?

[fol. 163] A. President.

Q. Now, you have a steam tug over 40 feet long, the Champion?

A. We have two or three.

Q. And you operate the Tyee?

A. Yes.

Q. And she has a tonnage—is over 65 feet?

A. Yes, sir.

Q. And the Ranger, Vance and Lucien, over 65 feet, four over and one under?

A. I think that is right.

Q. Those are run as Dr. Hutchins, Captain Hutchins, expresses it, by heavy oil engines?

A. Yes, sir.

Q. Where is your business on the Harbor?

A. Hoquiam.

Q. What kind of business do you handle?

A. Anything we can get ahold of.

Q. Are you called to haul any vessels that come in for lumber?

A. Yes, sir.

Q. Do you do anything of that nature in Grays Harbor?

A. Take them through the bridges and around the bends.

Q. Do the conditions there require the big off-shore vessels have the assistance of tugs in working around Grays Harbor?

A. They don't hire a tug unless they have to have them.

Q. Do they hire them right along?

A. Yes, sir.

Q. Would you be able to say what proportion of your [fol. 164] work consisted in handling vessels of that kind?

A. No. It is a small portion of our business. We had to assist one of them over the bar last month.

Q. Do you do any interstate, do you tow any down to Oregon?

A. Yes.

Q. How much?

A. Well, the Tye, up to the last couple of years was, about 90 percent of her business was down there. The last couple of years, I would say 25 percent.

Q. The last two or three years no towboat man tows much any place. What I want is, under normal conditions did you do considerable interstate business?

A. Yes, sir.

Q. Open to do interstate business now?

A. Yes, sir.

Q. What part of Oregon?

A. To about thirty miles south of the Columbia River.

Q. What other tugboat companies do you have in Grays Harbor?

A. The R. J. Ultican Tugboat Company.

Q. They are represented in this suit?

A. Yes, sir.

Q. Do Ulticans handle any of these interstate or offshore vessels?

A. Yes, sir.

Q. How long have you been in the tugboat business?

A. I have been an operator ever since 1909.

Q. Since 1909. That is far enough. That is two years after this ancient law we are considering was passed. Now, [fol. 165] you keep pretty well posted on what is happening in towing circles?

A. I try to.

Q. Have there been any severe tugboat accidents lately, resulting in loss of life? If so, what are they?

A. Not for quite a while.

Q. For how long?

Mr. Baker: If the Court please, it doesn't make any difference. Mr. Robinson has admitted we aren't concerned with the necessity of this regulation. He admitted, under the police power, the legislature has power to pass the law, so we are getting into things not necessary. The record is cumbersome enough now.

Mr. Robinson: The counsel comes in this morning and tries to make out the Winona was defective because it wasn't inspected, and the other counsel brings attention to the great lines of commerce. I should have some comeback.

The Court: I think you may proceed with it.

Mr. Robinson:

Q. Well, have you heard of any tugboat accident resulting in any particular loss of life since this Warren accident up here?

A. You mean here, or—we had an accident in '25.
Q. What was that?
A. A steam tug on the bar.
Q. A steam tug on the bar. An inspected tug?
A. Yes, sir.
Q. Men lost?
[fol. 166] A. Yes.
Q. Did you have any more around Grays Harbor?
A. No.
Q. How many men were lost in that steam tug?
A. Three.
Q. Did you have any more around Grays Harbor?
A. No.
Q. Do you know anything about this accident of the Warren?
A. Only what I have heard. I knew the operators.
Q. That was Ultican's boat, wasn't it? Is he there now?
A. His boy is here.

Mr. Robinson: Do you object to this man testifying, or do you want me to call Mr. Ultican?

Mr. Baker: It doesn't matter. I don't think it is competent.

Mr. Robinson: If you are objecting on the ground of hearsay, I will call Mr——

Q. Where was that boat Warren lost?
A. I couldn't say, I am sure.
Q. Do you know how many men lost their life in that accident?
A. If I remember right, it was three. I couldn't say.
Q. Other than the accident you have mentioned, do you, as to a towboat man, know of any loss of life in a towboat accident in the state of Washington in the last four or five years?
A. No, sir.
Q. And you only know those by hearsay?
A. Yes, sir.

[fol. 167] Mr. Durham:

Q. Do you do most of your towing around Grays Harbor?
A. Yes, sir.
Q. It has a shallow bar?
A. Not necessarily. It is a pretty good bar now, we think.

Q. A man has to be pretty familiar with the bar to navigate the bar?

A. Has to be to navigate anywhere.

Q. Some shoals there?

A. Yes.

Q. Lots of fogs there?

A. Not so much; not more than other places.

Q. Considerable of your towing is up the river?

A. We are towing from Willapa Harbor, and she isn't too straight. Nature didn't straighten her out too much.

Q. Channels the operator of a boat must know to operate it successfully?

A. Yes.

Q. Quite a few local conditions relating to navigation and safety that are peculiar to safety?

A. You have the condition anywhere.

Q. There are conditions there peculiar to Grays Harbor?

A. Yes.

Mr. Durham: That is all.

Mr. Baker: No questions.

(Witness excused.)

[fol. 168] R. J. Ultican, Jr., being a witness called on behalf of plaintiffs, after having first been duly sworn, testified as follows:

Direct examination.

By Mr. Robinson:

Q. Your name, please?

A. R. J. Ultican, Jr.

Q. You are connected with the towboat company that is one of the plaintiffs in this case?

A. Yes, sir.

Q. You remember that your company lost the Warren in 1928?

A. Yes, sir.

Q. Do you remember how many men were lost in that accident?

A. Five.

Q. The Warren was a motor tug, was she not?

A. Yes.

Q. That accident occurred around Protection Island?
A. As I understand, the accident occurred off Port Townsend.

(Witness excused.)

[fol. 169] FRANK GILKEY, being a witness called on behalf of plaintiffs, after having been first duly sworn, testified as follows:

Direct examination.

By Mr. Robinson:

Q. Mr. Gilkey, will you give your initials, please?
A. Frank.
Q. You live at Anacortes, do you not?
A. Yes, sir.
Q. You have been in the towboat business for a good many years in one way and another?
A. Yes, about eleven years.
Q. Operating all over Puget Sound?
A. Yes, sir.
Q. And some in the Dominion of Canada?
A. Yes, sir, considerable.
Q. You know what is going on in the navigation circles, generally?
A. Yes, sir.
Q. Do you know whether or not Canadian tugs go from Canada to American waters?
A. Yes, sir.
Q. Has there been any considerable of that business?
A. Considerable. In the past few years it has been spasmodic. Sometimes they do most of the towing and other times the American boats do nearly all the towing.
Q. When you say that, you are referring to log towing?
A. Principally.
Q. There are times when there are considerable Canadian tugs towing in these waters?
[fol. 170] A. Yes, sir.
Q. You heard the testimony of the loss of the Warren; you had heard of that?
A. Yes, sir.

Q. Do you know of any other tugboat accidents resulting in serious loss of lives and injury in the last five years?

A. Yes, we lost a boat, the Bahada, a steam vessel, with nine men aboard, and we had a total loss.

Q. When was that?

A. That was in November, 1926.

Q. She was a fully inspected steam vessel?

A. Yes, sir.

Q. Then, there was the loss of the Warren, a motor vessel?

A. Yes, sir.

Q. Do you know of any other tugboat accidents resulting in loss of life in the last five years?

A. No, I don't know of any loss of life. There has been other accidents.

Q. To be fair in the latter, it is possible there might be an individual or two lost here and there that you don't know of? There has been no major disaster?

A. No, not by a boat going down. There have been instances of a man killed by exposure or caught by a slip or something like that, but not from a boat sinking.

Q. Did you ever know the T. W. Lake?

A. Yes, sir.

Q. What was she?

A. The T. W. Lake was a vessel that was, I don't know, she was built previous to 1892. We have pictures taken of her at that time.

[fol. 171] Q. What kind of a vessel was that?

A. At the time she had the accident, she was carrying lime from Roche Harbor to Seattle, I believe.

Q. Do you know what year that was?

A. 1925, I believe, or '26.

Q. How many men were lost in that accident?

A. I don't remember exactly, twelve or fourteen men. I am not positive of the number of men.

Q. That is the largest marine disaster on local waters, for a number of years, isn't it?

A. Yes, sir.

Q. She was a steamboat under steam inspection?

A. I believe she was.

Q. Do you ever have to use tugs in Anacortes to handle the big boats out on the wharf?

A. Not often. Our docks are ample and the tides so favorable they don't need the assistance of tugs in that. The only occasion they use tugs there is where there might be a cross wind of the channel where they can't land or can't get away from the dock on account of the wind, and they use a tug, but that is very rarely.

Mr. Robinson: That is all, I think.
Mr. Baker: No questions.

[fol. 172] Cross-examination.

By Mr. Durham:

Q. In your testimony in regard to the accidents, you don't pretend to know what accidents occurred on the Sound with tugs, do you?

A. I just know from information.

Q. Just those you happen to have heard about, you are telling about?

A. Yes, we hear about most of these accidents that occur, being in that particular line of work.

Q. You excluded from that all accidents where life has not been lost? You have omitted all accidents which didn't happen to result in the loss of life, didn't you, where the people got ashore?

A. There have been accidents, I think, where the crew—I don't know as there has been any vssels have gone down. I don't know, there may have been one or two cases where the boat was abandoned. I couldn't say.

Q. You omitted accidents by an explosion or something like that, where the boat didn't sink?

A. Well, I don't know. There have been other little accidents. They are general. They occur quite often in general conditions of the Sound. There is accidents at different times.

Q. You haven't testified of the collisions between towboats and other vessels. You have heard of those?

A. No.

Mr. Robinson: The questions were confined to major loss of life on the face.

[fol. 173] Mr. Durham:

Q. Did you ever hear of the case of the boy by the name of Meagher that was killed on the Bermuda down near Edmonds?

A. I don't know, I might have. Was that on Wagner's?

Q. Wagner's Tugboat Company. The case went to the Supreme Court.

A. I am not familiar with the case. I am not familiar with it.

Q. Now, you don't contend that an inexperienced operator of a boat can run it as safely as a man of experience?

A. We don't have any inexperienced men on our boats.

Q. You put them on voluntarily; you, yourself, check the experience?

A. We satisfy ourselves the men are capable of handling the boats before we put them on.

Q. You are not compelled to by the Government?

A. Not on motor boats.

(Witness excused.)

[fol. 174] R. F. Johnson, being a witness called on behalf of plaintiffs, after having been first duly sworn, testified as follows:

Direct examination.

By Mr. Robinson:

Q. Give your initials, Mr. Johnson.

A. R. F. Johnson.

Q. The Johnson Towboat Company is located in Port Angeles?

A. Yes, sir.

Q. I have forgotten what your type of vessel is.

A. We have three Diesel vessels.

Q. How big?

A. The largest one is just under 65 feet.

Q. So they are all three motor boats?

A. Yes, sir.

Q. What sort of towing do you do?

A. General towing, local and foreign.

Q. Where do you tow foreign and how much?

A. We tow considerable from British Columbia with the Nainamo and Lady Smith.

Q. Which boats do you use on those, all three of them?

A. Yes, sir.

Q. All three are capable of doing that across the Straits of Juan de Fuca?

A. Yes, sir.

Q. Could you give us an estimation of what portion of your time is engaged in that foreign work?

A. It depends a lot on the times. I imagine about six trips a year these times. Of course, more——

[fol. 175] Q. Is there anything about the situation up there at Port Angeles that requires tugs to assist large vessels around the Harbor, or anything?

A. Occasionally.

Mr. Robinson: I think that is all.

Cross-examination.

By Mr. Durham:

Q. When were you last called upon to assist a large vessel around Port Angeles Harbor?

A. I couldn't say for sure. I would say about six months ago. I wouldn't say for sure.

Q. It is a very rare occurrence?

A. Yes, it is. It depends on the wind.

Q. You say you would say about six trips across the Straits a year?

A. About that, I would say.

Q. Out of a total of several hundred trips?

A. Yes.

Q. About how many trips do you take a year, your company?

A. Do you mean locally?

Q. What is the total number of towing trips in a year?

A. I couldn't say that. I would have to look it up.

Q. More than an average of one a day?

A. No, I wouldn't say it was more than an average of one a day.

Q. About one a day, on an average, taking all your boats?

A. A trip, you know, means all the way from one day to two weeks. It depends on the job.

[fol. 176] Q. I am taking all the trips, long and short.

A. I couldn't say the number of trips.

Q. Would it run one a day, would you say, on an average?

A. No.

Q. Three hundred a year?

A. No, I wish we did.

Q. How many a year, then, or about what percentage would this six be of your total business, total number of trips?

A. I am not prepared to answer that.

Mr. Baker:

Q. A small percentage or large percentage?

A. It is a small percentage of our business now.

Redirect examination.

By Mr. Robinson:

Q. Wasn't there a time some years ago you used to do a lot of gravel towing across the line?

A. Yes, sir, and also lumber north of Lummi Bay.

Q. That is not Canadian waters?

A. Yes, sir. That is on the northern end of Tuxada Island.

Q. At that time, you were almost exclusively engaged in that?

A. I would say 50 percent of our business was with British Columbia.

Q. How long ago was that?

A. I couldn't say exactly.

[fol. 177] Q. Roughly.

A. Six years ago, at least.

Q. Before the depression?

A. Yes.

Mr. Robinson: That is all.

(Witness excused.)

WEDELL FOSS, being a witness recalled on behalf of plaintiffs having been previously duly sworn, testified as follows:

Direct examination.

By Mr. Robinson:

Q. Mr. Foss, you were sworn this morning. I don't remember, Mr. Foss, if we discussed the matter of Canadian tugs. Do Canadian tugs tow down here?
A. Yes, sir.
Q. What sort of tugs?
A. Logs and coal, and once in a while lumber and ships.
Q. Is there much of that?
A. At times, considerable.
Q. They tow back from here?
A. Yes, sir.
Q. A Canadian tug comes down here and gets a load and tows to Canada?
A. Yes, sir.
Q. So they can compete with you in that field?
[fol. 178] A. Yes, sir.
Q. Do they?
A. They do.
Q. In Tacoma, is there any cases where your tugs are used in assisting the off-shore vessels?
A. One or two tugs are engaged in that continuously.
Q. What sort of work do you mean?
A. A ship comes in from Europe and, due to the Harbor there, the dock being in shallow waters, the vessels need tugs to assist them in and out again more in Tacoma than other places.
Q. You say there is quite a bit of that work in Tacoma?
A. Yes, sir.

Cross-examination.

By Mr. Durham:

Q. As a matter of fact, American boats aren't towing into Canada because they are stopped at the point of entry and pick up your haul?

A. The Canadians have an advantage because of the flexibility of their law and the inflexibility of our laws.

Mr. Baker: I think that is all.

(Witness excused.)

[fol. 179] Mr. Robinson: I would like to ask Mr. Foss one or two more questions.

WEDELL Foss, being a witness recalled on behalf of plaintiffs, having been previously sworn, testified as follows:

Direct examination.

By Mr. Robinson:

Q. Mr. Foss, you testified this morning you were in the towboat business all your life practically?

A. Yes.

Q. You keep pretty well posted what is going on?

A. I do.

Q. You heard the testimony about the Bahada and Warren accidents. Do you know of any other accidents resulting in loss of life in the last few years?

A. Yes, sir.

Q. What?

A. We had three losses of life in a period of 40 years of operation. The Wagner tugboat had one loss of life, and there has been two serious accidents in Seattle Harbor without loss of life.

Q. Tug accidents?

A. Yes.

Q. Do you know whether they were steam or motor?

A. In our three cases they were uninspected vessels and in the Wagner loss it was an uninspected vessel; and the other two, one was steam and one was uninspected.

(Witness excused.)

[fol. 180] CAPTAIN LINDLEY DAVIS, being a witness recalled on behalf of plaintiffs, having been previously sworn, testified as follows:

Direct examination.

By Mr. Robinson:

Q. Captain Davis, is there any tug operations in Seattle where the tugs are used to assist off-shore vessels around the Harbor?

A. Yes, sir.

Q. Any considerable amount?

A. Yes.

Q. What sort of situations arise to require that in Seattle?

A. Oh, some of the ships, the docks are so situated that it is hard to get in and out without a tug. It takes them a long time, and sometimes the wind is so they can't and they use a tug to assist them in docking and undocking; and sometimes in shifting, if they come in and the machinery is disabled, and they shift from dock to dock while loading or discharging. Shipping vessels go in from the sea, quite a few.

Q. I believe your company has more vessels in this suit than any other one company. Have you had any major accidents in the last eight or ten years?

A. No, I don't recall ever having a major accident, as to loss of life or injury.

Q. You mean any loss of life?

A. As I recall, we have never had any loss of life on any of our tugs.

Q. You have heard of the Bahada and the Warren accidents?

[fol. 181] A. Yes, sir, the same fleet the Bahada belonged to before I had anything to do with them, and the rest of that fleet is under my jurisdiction partly now; but, as far as the boats I have been managing, we have never lost any.

Q. You heard of those two accidents when they occurred?

A. Yes.

Q. Do you know of any other tug accidents comparable in seriousness with those that haven't been mentioned here?

A. No, I don't know of any comparable with those at all. I have known of some one or two men in years past. I think there was a gas boat a couple of times caught fire.

Mr. Robinson: That is all.

(Witness excused.)

Mr. Robinson: I will call the defendant Captain Parker.

CAPTAIN HOWELL PARKER, being a witness called on behalf of plaintiffs, after having been first duly sworn, testified as follows:

Direct examination.

By Mr. Robinson:

Q. Captain Parker, you are the marine inspector appointed by the Director of Labor and Industries, under this Act, are you not?

A. Yes, sir.

Q. You have held office now about two years, is it?

A. No, about a year and a half.

Q. I suppose you are a man with considerable marine experience?

[fol. 182] A. About thirty-five years.

Q. Yes. Now, have you actually inspected some vessels under this Act?

A. Yes.

Q. Have you inspected and issued certificates of inspection to them?

A. Yes.

Q. What did you do, Captain? Tell us what your inspection consisted of.

A. Oh, surveyed the hull for seaworthiness; surveyed the tanks for safety, and ordered life-saving equipment, lifeboats, and ordered safety valves on the air pressure tanks; looked after the sanitary part of the living quarters where men sleep; and, where they didn't have this equipment, gave them orders to put it on.

Mr. Baker: If the Court please, I want to object to further testimony along this line. It seems incompetent to establish whether or not the State has power to do these things by what the inspector has done under the law.

The Court: That might go to the allegation of what they are going to do.

Mr. Baker: We have admitted that.

Mr. Robinson: You stand by the allegation in your Answer?

Mr. Baker: By the allegation in our Answer, and we want to make it so clearly understood, so there won't be any question that we eschew and disavow any right to inspect any steamboat of any construction of——(interrupted.)

Mr. Robinson: We understand that now.

[fol. 183] Mr. Robinson:

Q. Did you ever inspect any? Did you ever inspect any steamboats?

A. Yes, sir.

Q. I mean under this Act.

A. Yes.

Mr. Robinson: I just want to qualify myself for having brought it out. He says he has inspected them.

Q. You are going to quit from now on?

A. One was on Lake Whatcom and one on land-locked waters.

Q. I thought so. Now, Captain, have you examined and issued licenses to various pilots, engineers and masters? What does your license cover when—wait a minute.

Mr. Robinson: Not to take time—you may object to this as immaterial. I wonder if you could furnish me samples of some license issued. Are you willing to?

Mr. Baker: Yes. I think we have copies of them.

Mr. Robinson: I suppose they are public property, aren't they?

Mr. Baker: I don't know why they shouldn't be.

Mr. Robinson: I saw one, I think, Captain, purported to be issued by you for motor vessels of two 100 tons motor vessels on Puget Sound as far as Port Townsend, and maybe is said something about Bellingham. Do you issue a license for all the waters in the State?

A. Only for the waters for which the men take an examination.

Q. Oh, I see. This is what I am trying to get at. I saw [fol. 184] a Puget Sound license. If a man was going to operate under your license, what kind of a license would he get?

A. A license for Grays Harbor.

Q. If he was going to operate around Longview and around there?

A. I never issued any license down there.

Q. Do you know what you intend to do about it?

A. No.

Q. So, if a man wanted to work both places, on Puget Sound or Grays Harbor, he would have to get two licenses?

A. No, take his examination for both ports.

Q. At the same time?

A. Yes.

Q. It would be possible for him to stand an examination for all ports and waters and get it if he specified it?

A. Yes, sir.

Mr. Robinson: That is all. Can I have some samples of those licenses tomorrow, Mr. Baker?

Mr. Baker: I don't have any with me.

Mr. Robinson:

Q. Have you some, Captain?

A. Yes.

Mr. Robinson: I don't know if I want them, but I would like to have them.

[fol. 185] Cross-examination.

By Mr. Baker: Just one question. May I ask the Captain a question here?

Q. Captain, have you inspected any motor boats on the Harbor and on inland waters and not land-locked waters which are subject to inspection, or have you issued certificates of inspection to those boats which are subject to be inspected by the Federal Government?

A. No.

Mr. Baker: That is all.

(Witness excused.)

Mr. Robinson: If the Court please, I will ask the Court to take judicial notice of the fact the Federal statute provides, among other things, that the Commissioner of Navigation, head of the Bureau of Navigation, and operating under the Secretary of Commerce, is directed to, each year, to report, among other things, to the Secretary of Commerce, changes which are required in the navigation laws; and, among other things, to report the activities of that Bureau which, up until a year and a half ago, was a distinct one from the steamboat inspectors, to the Secretary of Commerce; and I offer in evidence a number of reports [fol. 186] covering the years 1930—wait a minute, I think I begin earlier than that—1929, 1930, 1931, 1932, of that Bureau. And, in addition to that, I offer it, because I have it in no other form, the report for '33, which is contained in the report of the Secretary of Commerce to Congress and the same of 1934. Al of these reports which I offer are certified under the seal of the Secretary of Commerce.

Mr. Baker: Reports of what Bureau are they?

Mr. Robinson: They are for '29, '30, '31, '32, '33 and '34. Now, there are only certain parts of those, of course, that I want to use, and I don't know whether I ought to read those parts right now or wait until argument. I suppose counsel ought to be advised of them, and I suppose I ought to read in what I want.

Mr. Baker: I think you can read it as part of your argument because, if you are offering them in evidence, I would like to know what they are in the first instance, and it is my conception that you are offering them in evidence. It isn't necessary to read them at the time. You can make your argument from them.

Mr. Robinson: It is only a matter of saving time. I had anticipated putting them in, but I thought you might want evidence on it.

Mr. Toner: We would like to know what they are.

Mr. Robinson: Well, I will take one of them which is [fol. 187] typical of the lot. It is the same matter I want to use in each of them from the report. As I have stated, I can cite the law to the gentlemen if they wish it. This is required by law to be made by the Commissioner of Navigation to the Department of Commerce, and I will say

that my purpose of using these reports is to show that, entirely independent of the steamboat inspectors and outside that field, there is a big field of inspection which Captain Hutchins, I hoped, would explain to us, but which he very pointedly refused to say anything about.

I am reading from page 3 of the report of 1932:

"The Bureau, from time to time, has suggested the desirability of amending the steamboat inspection laws to cover fully the inspection of the increasing number of large vessels propelled by internal combustion engines.

"The tonnage of such vessels aggregates nearly a million tons, many of them large tonnage, carrying passengers and cargo in trans-oceanic trade, and navigated under conditions equally dangerous with those of smaller vessels propelled by steam. It would seem that they should be under the same requirements as to inspection.

"There are, in the United States, in the neighborhood of 300,000 vessels propelled by internal combustion engines, many of them small and operating on sheltered waters. It [fol. 188] is doubtless advisable, therefore, that such legislation should be restricted to vessels of larger size, possibly 100 gross tons and over."

I read, also, from page 5, Regulation of Small Motor Boats:

"The use of small motor boats on the sheltered and inland waters of the United States is expanding rapidly and, as they are a growing factor in small commerce and recreation, their regulation is of wide interest. On the navigable waters of the United States there are approximately 260,000 of these small vessels numbered and recorded in the Custom houses. It is safe to estimate that there are at least 400,000 such vessels. This number is now the highest in the history of motor boating.

"As these vessels are used by millions of our citizens during the year, Congress has paid special attention to their life-saving equipment, navigation and supervision. Under existing law, however, every provision seems to have been made which is reasonably necessary to the protection of those on board and if these small motor boats are operated in compliance with the laws now in force, a reasonable degree of safety will be attained."

I read from the bottom of the page under the caption, "Navigation Patrol Service."

"One of the important duties of our patrol fleet of six vessels, which cover the Atlantic and Gulf Coast and a part of the Great Lakes, is supervision of the life-saving [fol. 189] equipment on our 260,000 small motor vessels. At its inception the navigation of small motor vessels was dangerous. Improved hull construction and machinery has removed to a considerable extent the risk on these vessels and where they maintain proper life-saving equipment in accordance with the requirements of law, the loss of life is almost negligible. It is the duty of the patrol fleet to see that all vessels are equipped with life-saving devices.

"Another important duty is the supervision of the welfare of seamen in our coast-wise trade; to see that their wages are paid, and that they are given proper quarters and food. These patrol vessels, also, so far as opportunity offers, prevent the over-crowding of excursion steamers and see that larger vessels not only have their equipment on board, but licensed officers and crews."

I call attention, also, to a table on page 8, which is headed this way: "The following table shows the work done by the various branches of the Federal service engaged in the enforcement of navigation laws." And here is a table that shows the various districts, and we will refer only to Seattle:

"Seattle, 1,176 violations; 124 of them reported by the Coast Guard; 1,036 by the Customs Inspectors; and 16 by the Navigation Inspectors."

And just below that is this:

"Of the 8,062 cases reported, 3,733 were discovered by the Bureau's patrol boats. The record of the work of these vessels is better shown by the fact that, during the year, [fol. 190] the- made 31,079 inspections."

"I call particular attention to the word "inspections." "From these inspections but 3,733 violations of law were discovered. In other words, it was necessary to inspect approximately 10 vessels before even a technical infraction of the law was found."

Now, I will say to counsel that I have this report from '29 to '33, inclusive, the last two being contained in the Secretary of Commerce's report, all of which have the same data. Most of them refer to the same things I have spoken about, although not in the same language, and I thought this should be read to advise you of what I was doing, and I will read the rest if you wish.

Mr. Baker: No. What were the first reports from?

Mr. Robinson: They were all from the Bureau of Navigation except the last two. They are certified by the Secretary of Commerce.

Mr. Baker: Those reports are not competent to prove the issue involved. There isn't any question as admitted, and the testimony has proven to the Court that the Federal Government makes inspections or check-ups, but there is a whole blank field of a decided nature covering a definite scope in it the Federal Government doesn't meet, for instance, below decks of motor boats, no matter what size. Those particular reports have no bearing on the question as to whether or not the State has the power to inspect and [fol. 191] regulate and license people who take care of these duties the Federal Government has no duties or concern with. That is the reason I object to the reports.

The Court: I think they may be admitted with the understanding the argument Mr. Baker is making is properly made at the close of the case; and if it is relative, then——

Mr. Baker: I am arguing on the admissibility of them.

The Court: I understand.

Mr. Robinson: I am sure of the admissibility but, in view of the Court's ruling, I reserve that for the end of the case.

I will say further, Gentlemen, I have uncertified copies of almost all of this, or most of it, and if you want the loan of them overnight, I will loan them to you.

Mr. Baker: We consider them immaterial.

Mr. Robinson: They are very material, and you had better look at them.

Mr. Baker: I will be glad to look at them.

(Reports admitted in evidence as plaintiff's exhibits 6, 7, 8, 9, 10 and 11.)

Mr. Baker: We have one more witness to call and that will complete our case when Mr. Robinson——

Mr. Robinson: You call him while I look at this; otherwise, I am through with my testimony.

[fol. 192] KENNETH DURHAM, being a witness called on behalf of defendants, after having been first duly sworn, testified as follows:

Direct examination.

By Mr. Baker:

Q. Your name?
A. Kenneth Durham.
Q. You are an attorney in the practice in Seattle?
A. Yes.
Q. Mr. Durham, you were connected with the Department of Labor and Industries at one time?
A. Yes, sir.
Q. In what capacity?
A. As supervisor of Industrial Insurance and, for a short time, as Director of Labor and Industries.
Q. Mr. Durham, during the time you were connected with the department as supervisor, or director, or do you know of your own knowledge, whether the department at that time inspected vessels on navigable waters of the state, navigable waters?
A. They did.
Q. Will you tell us when that was?
A. I haven't checked the records lately, but about 1922 or '23 for a short time. All that time it was the position of the department that that inspection was under the authority of our department, and for a short time they actually did inspect a number of tugboats, on Puget Sound. I believe the inspector's name was Stuth, but, due to the lack of appropriations at the time, there was no full-time man, and need for other inspection work, and it was discontinued [fol. 193] and he was sent over to inspect on Chelan and one or two other inland lakes, for a few weeks at a time, so he would be available for general safety inspection in the camps.

Mr. Baker: You may inquire.
Mr. Robinson: No questions.
(Witness excused.)

Mr. Robinson: I have an annual report of the United States which is not certified to. If you object to it—— (interrupted)

Mr. Baker: Do you want to put it in?

Mr. Robinson: Yes.

Mr. Baker: For what purpose?

Mr. Robinson: I will tell you what I want it for. The Coast Guard is required by law to tabulate the number of deaths in the marine service occurring on all vessels in the United States waters and throughout the world as long as they bear the American flag. I want to show in 1930, for instance, being the only one I have, that the aggregate number of passengers and crew lost in all marine disasters of vessels was 310. All American vessels all over the United States and wherever the vessels, the American vessels all over the world. I don't need to put it in.

[fol. 194] Mr. Baker: I don't object to the form of the evidence, but I object to its materiality. I call your attention, if you consider that to be of value, you might consider the Morro Castle and other disasters.

Mr. Robinson: I would like to have you mention that. She was an inspected steamboat.

Mr. Baker: I point out the fact those figures aren't reliable. I don't have any objection if you want to put it in.

Mr. Robinson: I withdraw the offer.

(Whereupon an adjournment was taken until ten o'clock a.m. March 28th, 1935.)

(Upon reconvening, the following proceedings were had and testimony taken:)

Mr. Robinson: If the Court please, I didn't close my case last night because there were one or two things I thought I might want to go ahead with and I might want to go ahead a little further.

[fol. 195] W. H. SUTTER, being a witness called on behalf of plaintiff, after having been first duly sworn, testified as follows:

Direct examination.

By Mr. Robinson:

Q. What are your initials?

A. W. H. Sutter.

Q. Mr. Sutter, you were for many years a Deputy Commissioner of Labor in the Labor Department of the State?

A. Yes, sir.

Q. If my information is correct, you became so early in 1913?

A. Yes, under the administration of Governor Lister, I think it was, '13. I think I have the credentials here. It was the only thing I could find.

Q. You have your commission in your pocket, haven't you?

A. The only thing I could find. I have discarded everything. I think it was 1913. Maybe it is in my overcoat pocket. I had it out looking at the date. I think it was '13. Whenever Governor Lister was elected. He was elected in '12 and——

Q. At any rate, right after Governor Lister took office, you became a deputy in the Labor Department?

A. Yes, sir.

Q. And Governor Lister took office in January, 1913?

A. I think my commission read April.

Q. It did. I read it this morning.

A. Here it is. I have it here. It is the only record I have here. April 12th, 1913. There it is right there. Signed by E. W. Olson.

[fol. 196] Q. You continued in the Labor Department all through the service of Governor Lister and all through the time that Governor Hart was Governor, and a little time in the time of Governor Hartley?

A. A short time in Hartley's administration, yes.

Q. You were in the Labor Department and Hartley took office in 1925, so you were there something over twelve years?

A. Something like that. I know I left the Hartley administration shortly after Hartley was in.

Q. During the twelve years you were in the Labor Department, who was marine inspector under the State Regulation of Vessels Act?

A. When I first went in, I succeeded Mr. Stone and Hoage and I were inspectors together. I was inspector of machinery equipment. We had very few boilers and Hoage was inspector of captains.

Q. You mean when you went in you became such inspector?

A. Yes, sir.

Q. And remained so all the time you were there?

A. Yes, sir.

Q. Wasn't there a time all of it was under your direction?

A. Yes; I think about three years later, Mr. Hoage left the Department and I had to take both captain and engineer.

Q. During those twelve years, Captain, did you or the Department inspect any vessels on the navigable waters of the United States; that is, on salt water?

A. No.

Q. You did not?

[fol. 197] A. No.

Q. I will ask you if you inspected vessels on Lake Union.

A. I did for a while. I inspected vessels on Lake Union. I think it was the old Brasel Hursey's tugboat. She was a steamer.

Q. Why did you cease inspecting that?

A. As soon as the Canal was dug through they took it away from me.

Q. Who?

A. I suppose the Federals took it away, and later I think the boat was condemned. There was a good deal of comment about the boat at the time. I believe Mr. Short went out with me and he said as long as the boat was under State inspection, they had no record of its blueprint before the boat was put in commission, as the Federal was now, and several times I wondered if we were exceeding our right to inspect the boat without a blueprint; but our law didn't say it needed a blueprint, and they said it would come under the Federal as soon as the waters were opened to the Sound and they would condemn it because they didn't have a blueprint of it before it was built.

Q. When the lake was opened so it became connected with navigable waters, you ceased examining it?

A. I had nothing to do with it after that.

Q. Do you know Kenneth Durham?

A. I believe he worked with the Department somewhere when I was there.

Q. He left before you left, didn't he?

A. I don't remember. I think I left before he did. I [fol. 198] wouldn't swear he was there at the same time, but I think I knew Kenneth.

Cross-examination:

Q. Were you connected with the Department when Mr. Durham was the Supervisor of Industrial Insurance?

A. Well, I tell you I couldn't say if I was or not, because I have seen him so many times since and after I left the Department I carried on some similar work. I don't remember.

Mr. Robinson: Didn't Mr. Durham give dates?

Mr. Baker: I think he said he was there from 1923 on.

A. I wouldn't say he wasn't. Going right on with the same kind of work——(interrupted)

Mr. Robinson: I am not contradicting Mr. Durham, anyway.

Mr. Baker:

Q. Mr. Durham testified he was the Supervisor of Industrial Insurance a part of the time when he was acting Director of the Department. I think it was from 1923 on he was. For a short time, under that administration, the Department of Labor and Industries inspected vessels on the Sound under the authority of this 1907 Act. You aren't prepared to state that wasn't true?

A. No. I know I didn't inspect any, but maybe Gill Day that took my place or—I didn't do it.

Q. The only thing you say is you didn't?

[fol. 199] A. I didn't inspect boats on Puget Sound at all.

Q. You don't know what happened after you left?

A. No.

Redirect examination.

By Mr. Robinson:

Q. You say you were inspector from 1913 to 1925, and during that time no boats were inspected on Puget Sound?
A. No.
Q. And neither you or the marine inspector inspected them?
A. No.

Recross-examination.

By Mr. Toner:

Q. Where did you get your authority?
A. From the Labor Commissioner.
Q. It wasn't your business to look at the law and see if you could inspect boats in Puget Sound?
A. I was just working under my boss, the Labor Commissioner.
Q. You did what you were told to?
A. Yes.
Q. You didn't inspect any boats in Puget Sound?
A. My understanding was I had to go around and look up boats, go through the lakes and see if any boats were for hire. We did not inspect boats not for hire. There are many boats on the lake in this state here that we didn't inspect at all because they were not carrying passengers for hire. I will cite another instance. I don't know what this is about. I was called here hurriedly. For in-
[fol. 200] stance, there was a tugboat on Lake Wenatchee. Lake Whatcom. I had three steamers up there, I think. the Margaret and another one, I forget the name. They had one or two boilers and I inspected those. I went over and inspected one of the tugboats carrying for a mill, and I was kicked out because they weren't for hire. It was their own business and they were hauling their own logs.
Q. Who sent you out there?
A. Nobody. When I saw a boat I went over and asked if it carried for hire, boats for hire, and if so, I inspected them. The only thing inspected on the private boats was lights.
Q. Not machinery?

A. We had no jurisdiction over private launches not carrying for hire, and we assessed the fee on them, fee from $15 to $20, on boats carrying passengers for hire.

Q. You did what your superiors told you to do?

A. Yes, sir.

Mr. Robinson:

Q. Was there a record made of all these inspections and the things you did?

A. There is regular records filed. A regular form to fill out, questions and answers. I suppose they have the same thing yet.

Q. Unless it is destroyed, that record should be in the Department?

A. I used to keep records of my own, but I think I destroyed them.

Mr. Robinson: I think that is all.

[fol. 201] Mr. Baker: Just a minute. That is all, no questions.

(Witness excused.)

WEDELL Foss, being a witness recalled on behalf of plaintiffs, having been previously sworn, testified as follows:

Direct examination.

By Mr. Robinson:

Q. Mr. Foss, referring to the two fleets of tugs of the Foss Company and the Foss Tug and Launch—(interrupted)

A. Launch and Tug.

Q. Launch and Tug Company, I will ask you, if, as a matter of fact, any of your masters or engineers do have Federal licenses?

A. Yes, they do.

Q. How many of them?

A. I should say from 30 to 50 percent, possibly more.

Mr. Baker: I think this line of testimony is immaterial, as long as the Federal statute doesn't require it.

Mr. Robinson: I know the Federal statute doesn't require it. That is conceded. I want to find out if you people are

going to require a State license if the man has a Federal license.

Mr. Baker: As a matter of fact, if the state statute provides for it and the Federal Government doesn't provide [fol. 202] for it, it would be within the power of the state to require it. After all, if a man, of his own desire, proceeds to take out a license the Federal Government doesn't require, it doesn't affect the regulations of the state because the law is well settled along those lines.

The Court: The testimony is in.

Mr. Robinson:

Q. These men have licenses of the Federal Government in some cases, authorizing them to serve as engineer or pilot on much larger boats than they are now on?

A. Yes, sir.

Mr. Baker: No questions.

(Witness excused.)

Mr. Robinson: I think that is all.

Captain Howell Parker, being a witness recalled on behalf of defendants, having been previously sworn, testified as follows:

Direct examination.

By Mr. Baker:

Q. Captain, you have already been sworn?

A. Yes.

Q. In 1907, at the time this state inspection law was passed that is now in question, what were you then doing by way of occupation?

A. I was working as a master of one of the tugs of the Crosby Towboat Company.

[fol. 203] Q. You were master at that time?

A. Yes; sir.

Q. Were you affiliated with any organization of seamen?

A. I was a member of the National Pilots and Masters Association.

Q. At the time of this bill was there any discussion relative to the intents or purposes of this statute?

A. Yes, it was discussed.

Mr. Robinson: Between whom?

A. Between the members of that organization at the regular meeting, brought up on the floor; as the Federal Government had repealed that act, it was time for the State to step in and do something because, in the future, there would be a great many internal combustion engines, and it was brought up and discussed, and that is the father of the bill, I believe.

Mr. Baker:

Q. Who sponsored the bill?

A. I understand the masters, mates, and pilots did.

Q. Is the masters, mates and pilots, is an organization composed of whom?

A. Of the masters of ships, steamships, passenger ships, and towboats.

Q. Of men entirely engaged in running boats on land-locked waters?

A. What do you mean, the lakes?

Q. Yes.

A. None of those men belong to masters, mates and pilots.

Q. So the bill was sponsored by men engaged on the navigable waters of the State.

[fol. 204] Mr. Robinson: We have been liberal with each other on this. I won't move to strike, but I will say it is immaterial and irrelevant.

Cross-examination.

By Mr. Robinson:

Q. Here is a placard I have in the Complaint. That was gotten out under the orders of your department, was it not?

A. I don't know. It was gotten out before I took office.

Q. It was distributed through the community during your period of service, was it not?

A. It probably was.

Mr. Robinson: I want to put this in evidence. There is a copy of it in the complaint and it is admitted, but I want it in, itself if you have no objection.

Mr. Baker: It bears the Department's stamp. I don't think anyone would forge it.

Mr. Robinson: It is an exact copy.

Mr. Baker: I don't doubt that is an exact copy.

(Placard admitted in evidence as plaintiff's exhibit 12.)

(Witness excused.)

[fol. 205] MOTION TO DISMISS

Mr. Baker: The Department, the defendants, or three of them, now rest their case, and we again move to dismiss some of the Complaint in this action on the grounds, on the ground the Summons and Complaint fail to state cause of action entitling the Claimants to the relief they ask for.

Now, I want to tender the Court an argument on that. It is no more than a recitation of our demurrer, but I think it is proper at this time to challenge the Summons and Complaint at any time throughout the proceedings. We want to make our record clear. At this time, we think the Court, in all probability, will reserve decision until argument on the case, as a whole, and we reserve our argument until that time.

The Court: Yes, that is all right.

(Whereupon both sides rested.)

[fol. 206] IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

MEMO. OPINION

It is impossible for this Court to reconcile many of the authorities cited by counsel. However, after a rather thorough consideration, it is the opinion of the Court that the act complained of is susceptible of a construction by the defendant that would not be overlapping the field cov-

ered by Federal law. In so ruling, the Court is expressing no view as to the specific acts on the part of the defendant.

An order may be taken in conformity herewith.

(Signed) D. F. Wright, Judge.

[fol. 207] (On Monday, the 24th day of June, 1935, the following additional proceedings were had in the above entitled cause, towit:)

STATEMENT RE PROPOSED ORDER

Mr. Robinson: The Court please, in this matter, Mr. Toner has given me a copy of a proposed order which I understand accords with the Court's opinion as I understand it. I have asked the reporter to be present for this reason.

During the preliminary arguments, I think it was the argument on demurrer, Mr. Toner suggested that I do not prevail in this case unless Your Honor should hold that no part of this law ought to be enforced against these people; and, of course, the order is in those terms. At that time I contended that I had set forth certain acts, threatened acts, which were admitted—no, not admitted at that time, but I had set forth certain threatened acts and that under any prayer for order prayed for and such other relief as I might be entitled to, and to what lesser prohibition than I had prayed for; And then, after the matter was answered and it was admitted, those acts threatened, and one done, it seemed to me I would be entitled to some sort of an injunction if any of the acts complained of were not lawful.

Your Honor, if I remember your opinion correctly, sug-
[fol. 208] gested that you were not convinced but what there might be some things in that law which did not overlap the Federal law, but did not pass upon any of the acts.

Now, I am afraid in the present state of the record, if I get into the Supreme Court, they might say to me: "You didn't ask the court below to enjoin any specific acts." I am now making that request. I will add, however, I don't think it makes much difference if you enter this order or not, because the Court will have the matter before it, and the matter would be de novo here; and the reason I am asking it is so it will not be said I never raised that point

in this court; and, for that reason, I have asked the stenographer to be here; and I will ask Your Honor to instruct her, when she furnishes me the Statement of Facts, she may include this statement I have made here today.

The Court: Yes, certainly.

(Whereupon the case was closed and no further proceedings were had.)

[fol. 209] ORDER SETTLING STATEMENT OF FACTS

On this 14th day of December, A. D. 1935, pursuant to due notice of application for settlement and certification of the Statement of Facts in the foregoing entitled action, the parties to said action appearing by their respective attorneys of record herein, the undersigned, Honorable D. F. Wright, Judge of said court presiding at the trial of said action, now hereby settles the annexed and foregoing Statement of Facts as the Statement of Facts in the said action and Hereby Certifies:

That the matters and proceedings embodied in the annexed and foregoing Statement of Facts, exhibits and other written evidence introduced and offered in evidence upon the trial of said action, and filed in said cause, and now marked and identified by me as follows: Plaintiff's Exhibits 1, 3, 4, 6, 7, 8, 9, 10, 11 and 12; Defendants' Exhibits 2 and 5, referred to and identified in the foregoing proposed Statement of Facts, are matters and proceedings occurring in said cause, and the same are hereby made a part of the record therein; and that the same contain all the testimony on which said cause was tried; evidence produced or offered by either of the parties to said action, together with all of the objections and exceptions of counsel, taken to the reception or rejection of testimony, and the rulings of the Court therein, all documents and instruments in writing introduced or offered in evidence, and all the material facts, matters and proceedings heretofore occurring in said cause, and not already a part therein; and the Clerk is hereby ordered to attach to the said Statement all of the said original exhibits on file in said cause as herein identified and which the Clerk of this court is ordered to transmit to the Clerk of the Supreme Court.

Done in open court this 14th day of December A. D., 1935.

D. F. Wright, Judge.

Service hereof admitted and copy received this 31st July, 1935.

W. A. Toner, Attorney for Defendants.

[fols. 210-236] Appellants' abstract of record, filed January 31, 1936, omitted in priting.

[fol. 237] In Supreme Court of Washington

En Banc

No. 26052

The State of Washington on the Relation of Foss Company, Inc., a Corporation, et al., Appellants,

v.

E. Pat Kelly, as Director of the Department of Labor and Industries of the State of Washington; Jay Olinger, as Supervisor of the Safety Division of said Department, and Howell Parker as Deputy of said Director, under the title, Marine Inspector, Respondents

Opinion—Filed July 9, 1936

The appellants, as plaintiffs, by this action sought the issuance of a writ of prohibition to prevent the defendants from in any manner enforcing or attempting to enforce chapter 200, Laws of 1907, as against them. From a judgment of dismissal, entered after trial on the merits, the plaintiffs have appealed.

The material facts are now very little in dispute and may be briefly summarized as follows: The appellants own and operate one hundred thirty nine motor driven tugs, of which one hundred eleven are less than sixty-five feet in length. Some of these tugs are registered and the remainder are all enrolled and licensed under Federal laws. For the most part, these tugs are employed in intrastate

commerce, but some tow to and from British Columbia ports and some tow back and forth across the Columbia river, or from other ports in Washington to ports in Oregon. Practically all of these tugs are capable of engaging in interstate or foreign commerce and will do so if and when opportunity offers. Some of the larger tugs have [fol. 238] towed and will tow to California ports. The main business, however, of most of the tugs is confined to moving vessels engaged in interstate and foreign commerce, and other work in and about the harbors where they are stationed.

The United States Government has for many years maintained a steamboat inspection service, but neither that nor any other Federal agency has been empowered by Federal legislation to inspect motor driven tugs for seaworthiness or as to the condition of their mechanical equipment, or to license the officers who operate them.

Chapter 200, Laws of 1907, is a comprehensive and complete code for the inspection and regulation of every vessel operated by machinery which is not subject to inspection under the laws of the United States.

It is charged by the complaint and admitted by the answer that unless prohibited the department and its officials will (1) enforce as against the appellants and their vessels the provisions of §9 of the act referred to, relating to signal lights; and (2) that appellants will be proceeded against for penalties unless, among other things, they will do the following:

"(a) Submit such vessels to inspection annually or oftener if the director shall deem it reasonable, at a cost to said owners of not less than five nor more than twenty dollars for each inspection.

"(b) Make such changes, repairs and improvements as said director may thereupon require.

"(c) Carry such officers on said vessels as the Director shall after examination license as masters, pilots, and engineers.

"(d) Carry such crews as he shall deem necessary to manage each vessel with safety.

"(e) Carry such life saving equipment as he shall require and approve.

"(f) Carry such fire prevention apparatus as he shall require and approve.

"(g) Keep on board at all times a copy of the license to be issued by the director authorizing the vessels to navigate in and upon the waters within the territorial limits of the state, the same to be posted in a conspicuous place.

[fol. 239] "(h) Keep a copy of the first twenty-two sections of the act posted in a conspicuous place on said vessel.

"(i) Keep two copies of the navigation rules set out in section 8 of the act posted in the vessel, one in the pilot house, the other in a conspicuous place.

"(j) Keep the vessel's name painted on her stern in the character and colors prescribed by section 16 of the act.

"(k) Comply with all orders, regulations and requirements of the Commissioner (Sec. 25)."

The appellants' main contentions are (1) that Congress has exclusive power to make laws for the government of foreign and interstate commerce, which includes the power to make rules governing navigation upon the navigable waters of the United States; that as to some things its power is absolute and exclusive and as to others, where there is a concurrent power, legislation by the state must give way when Congress has occupied the field whether such legislation conflicts with Federal legislation or not; and (2) that therefore the state had no right to legislate as to most of the provisions of the act in question. Some other questions are presented which, however, it does not appear necessary to consider.

There are lakes within the state which are navigable. These are land locked and both sides agree that the state has exclusive jurisdiction of all matters pertaining to the navigation thereon and that this act of the legislature may and does apply to all vessels operating on such land locked waters.

Within, or adjacent to the boundaries of the state, are also navigable waters known as inland waters, over which the Federal Government has control, and the high seas, over which the Federal control is limited by international rules which our government has adopted by agreement with other maritime nations.

While the appellants' tugs mostly operate in inland waters, some go upon the high seas and, in any event, if the [fol. 240] state may not legislate in the manner here disclosed with reference to operations in inland waters, of course it cannot do so with reference to operations upon the high seas.

The Federal legislation with respect to vessels and navigation in navigable waters is of vast extent and seemingly it covers every situation and condition which the Congress has considered to be necessary or advisable to cover. Even row boats are required to carry a lantern showing a white light to be exhibited under certain conditions. U. S. C. Title 33, §77.

All of the vessels involved in this case, whether registered or enrolled and licensed to engage in the coastwise trade, come under the Federal legislation. Motorboats not more than sixty-five feet in length are defined and regulated by chapter 16, Title 46, U. S. C. True, that chapter does not require inspection for seaworthiness or the examination and licensing of officers, but presumably, Congress went as far in the regulation of such boats as it thought to be necessary.

"This doctrine of a general concurrent power in the states is insidious and dangerous. If it be admitted, no one can say where it will stop. The states may legislate, it is said, wherever Congress has not made a plenary exercise of its power. But who is to judge whether Congress has made this plenary exercise of power? Congress has acted on this power; it has done all that it deemed wise; and are the states now to do whatever Congress has left undone? Congress makes such rules as, in its judgment, the case requires; and those rules, whatever they are, constitute the system." Gibbons v. Ogden, 6 Law Ed. (2d) 23.

Upon this question of occupancy of the field, the railroad cases seem to be in point and to support our view that Congress has here occupied the field. Northern Pacific Railway Co. v. Washington, 222 U. S. 370, and Southern Railway Co. v. Railroad Commission of Indiana, 236 U. S. 439.

The exception to this rule, if it be an exception, seems to be with reference to state legislation affecting pilots and pilotage. In Cooley v. Board of Wardens of Port of Phila- [fol. 241] delphia, 12 Howard, 299, the Federal Supreme

Court upheld legislation by the state of Pennsylvania on this subject on the ground, apparently, that though Congress had the power to regulate and when a uniform rule was necessary that power was exclusive, yet as to pilotage, uniformity was not necessary and the states might act. It was there said:

"* * * This provision of the Constitution was intended to operate upon subjects actually existing and well understood when the Constitution was formed. Imposts and duties on imports, exports, and tonnage were then known to the commerce of a civilized world to be as distinct from fees and charges for pilotage, and from the penalties by which commercial states enforced their pilot-laws, as they were from charges for wharfage or towage, or any other local port-charges for services rendered to vessels or cargoes; * * * it also follows, that this law is not repugnant to the first clause of the eighth section of the first article of the Constitution, which declares that all duties, imposts, and excises shall be uniform throughout the United States; for, if it is not to be deemed a law levying a duty, impost, or excise, the want of uniformity throughout the United States is not objectionable. Indeed the necessity of conforming regulations of pilotage to the local peculiarities of each port, and the consequent impossibility of having its charges uniform throughout the United States, would be sufficient of itself to prove that they could not have been intended to be embraced within this clause of the Constitution; for it cannot be supposed uniformity was required, when it must have been known to be impracticable."

This court in State v. Ames, 47 Wash. 328, 92 Pac. 137, recognized the right of the state to legislate on the subject of pilotage and gave the reason as being that Congress had not attempted to regulate the whole subject of pilotage.

Whether this court, in the Ames case, supra, gave the correct reason for sustaining state legislation on the subject of pilotage is not particularly material. Whichever reason be the true one, pilots and pilotage alone seem to stand out as affording a field for state legislation.

We have not overlooked the case of Stewart & Co. v. Rivara, 274 U. S. 614, where a state law as to conditional sales contracts was upheld. The court there pointed out:

"Clearly there is nothing in the state law to interfere with [fol. 242] the use of such vessels as instrumentalities of interstate commerce." It is obvious that the contrary is true here.

The case of United Dredging Co. v. City of Los Angeles, 10 F. (2d) 239, affirmed in 14 F. (2d) 364, holds that local authority may not enforce an ordinance requiring inspection and licensing of officers for the operation of steam dredges operating in the harbor. Language used by the district court as to the police power of the city seems to be entirely beyond the question involved and therefore requires no comment. The question actually decided makes the case an authority against the right of the state to interfere.

Cases are cited which sustain local laws fixing harbor charges and local laws as to liability for torts, but we cannot see their applicability, nor are the ferry cases in point here. The principle which must govern, we think, is laid down in Harman v. Chicago, 147 U. S. 396, where it was contended that a local municipality might, through license fees, exact compensation for the use of the harbor within its limits, which had been by it improved and made usable. After an exhaustive review of the previous decisions of the Supreme Court, Mr. Justice Field said:

"The license fee is a tax for the use of navigable waters, not a charge by way of compensation for any specific improvement. The grant to the city under which the ordinance was passed is a general one to all municipalities of the state. Waters navigable in themselves in a state, and connecting with other navigable waters so as to form a waterway to other states or foreign nations, cannot be obstructed or impeded so as to impair, defeat or place any burden upon a right to their navigation granted by Congress. Such right the defendants had from the fact that their steam barges and towboats were enrolled and licensed, as stated, under the laws of the United States."

So here, the license fee is a tax and the other regulations, speaking generally, are all burdens upon navigation and to some extent upon interstate commerce.

[fol. 243] We have examined with care those cases holding that state legislation as to matters wholly local, or in-

tended to aid commerce, is permissible, such as The Steamboat. New York v. Rea, 59 U. S. 223; County of Mobile v. Kimball, 102 U. S. 691, and other cases of like import. These are based upon the police power and are seemingly limited to strictly local affairs. Of the dozen or more things proposed to be done by the respondents under the state act, not one is purely local. Every one has a tendency to interfere with uniformity and most of them are such as to constitute a burden upon interstate commerce.

We are satisfied that the act is invalid if applied to the navigable waters over which the Federal Government has control. We are confirmed in this view by the fact that in the twenty-nine years since its enactment no real attempt has been made to enforce it against those operating vessels of any kind upon the navigable waters of the United States until the present controversy arose.

The judgment of the trial court is reversed with instructions to enter judgment in conformity with the views expressed.

Tolman, J. Geraghty, J.

We concur: Beals, J. Holcomb, J. Steinert.

[fol. 244] IN SUPREME COURT OF WASHINGTON

26052

DISSENTING OPINION

BLAKE, J., dissenting:

The relators, some thirty-one companies, partnerships and individuals, operating power tugboats and towing vessels of less than sixty-five feet in length in navigable waters of this state, brought this action in the superior court of Thurston county to obtain a writ of prohibition directed to E. Pat Kelly, as director of the department of labor and industries. The writ sought would prevent the director from enforcing or attempting to enforce any and all provisions of chapter 209, Laws of 1907, entitled:

"An Act regulating steam vessels, and vessels or boats operated by machinery, navigating the waters within the jurisdiction of this state, excepting vessels which are sub-

ject to inspection under the laws of the United States, and providing penalties for the violation thereof."

The cause was tried on issues joined by answer to the complaint. From judgment entered dismissing the action, relators appeal.

As indicated by what has been said, relators attack the validity of the act in its entirety. It is a mass attack on the whole of a legislative enactment. Under such circumstances, it is not the function of the court to "anticipate a question of constitutional law in advance of the necessity of deciding it." Steamship Co. v. Emigration Commissioners, 113 U. S. 33; Abrams v. Van Schaick, 293 U. S. 188; Wilshire Oil Co. v. United States, 295 U. S. 100. Nor will the court "decide questions of a constitutional nature unless absolutely necessary to a decision of the case." Burton v. United States, 196 U. S. 283; Stephenson v. Binford, 287 U. S. 251.

[fol. 245] Under such an attack as made by relators, the question to be determined is whether any portion of the act is valid and enforcible. If any portion of the act is found valid and enforcible, the court should not extend the inquiry further nor undertake to say in this action what portion of the act may be invalid and unenforcible. What was said in Steamship Co. v. Emigration Commissioners, supra, is peculiarly pertinent to the method of attack adopted by relators in this case:

"If, on the other hand, we should assume the plaintiff's case to be within the terms of the statute, we should have to deal with it purely as an hypothesis, and pass upon the constitutionality of an act of Congress as an abstract question. That is not the mode in which this court is accustomed or willing to consider such questions. It has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. These rules are safe guides to sound judg-

ment. It is the dictate of wisdom to follow them closely and carefully."

As I proceed, I think it will be apparent why the question to be decided in this case should be so circumscribed.

The question, as circumscribed, dispenses with the necessity of analyzing chapter 200, Laws of 1907, in detail. As [fol. 246] indicated by its title, it contains regulations with respect to the operation of automotive vessels in the navigable waters of this state. The act specifically disclaims any intent to control navigation or regulate vessels in any situation where Congress has enacted legislation upon the subject. Thus circumscribed, the problem resolves itself into two phases: (1) Does the maritime jurisdiction of the United States preclude the state from enacting any regulatory legislation with respect to the operation of vessels on navigable waters within the boundaries of the state? (2) If not, are there any regulations prescribed by chapter 200, Laws of 1907, which cover a field not occupied by Federal legislation?

First. There can be no question but that the United States has primary jurisdiction over the navigable waters of this state. It is also without question that such jurisdiction is exclusive when exercised. In other words, a state may not legislate upon a subject within maritime jurisdiction if the United States has occupied the field. But it does not follow that a state may not legislate upon a subject within maritime jurisdiction when there is no Federal legislation on the subject.

In the case of United Dredging Co. v. Los Angeles, 10 F. (2) 239, the rule is stated as follows:

"It may be admitted that reasonable police regulations may be imposed upon maritime craft, where considerations of safety are present in the locality under the jurisdiction of a municipality. Such regulations must be reasonable ones, and may be enforced, provided that the United States government has not already taken possession of the field in which it has primary jurisdiction. The law applicable was well stated by Judge Brown in The City of Norwalk (D. C.) 55 F. 98, where he said that the rule in favor of [fol. 247] federal jurisdiction did not 'exclude general legislation by the states, applicable alike on land and water,

in their exercise of the police power for the preservation of life and health, though incidentally affecting maritime affairs: Provided that such legislation does not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations.' "

The rule as thus stated has ample support in decisions of the Supreme Court of the United States. Sherlock v. Alling, 93 U. S. 99; County of Mobile v. Kimball, 102 U. S. 691; Pittsburg & Southern Coal Co. v. Louisiana, 156 U. S. 590. In the case of County of Mobile v. Kimball, supra, it is said:

"The uniformity of commercial regulations, which the grant to Congress was designed to secure against conflicting state provisions, was necessarily intended only for cases where such uniformity is practicable. Where from the nature of the subject or the sphere of its operation the case is local and limited, special regulations adapted to the immediate locality could only have been contemplated. State action upon such subjects can constitute no interference with the commercial power of Congress, for when that acts the state authority is superseded. Inaction of Congress upon these subjects of a local nature or operation, unlike its inaction upon matters affecting all the states and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done with respect to them, but is rather to be deemed a declaration that for the time be-
[fol. 248] ing, and until it sees fit to act, they may be regulated by state authority."

Regulatory measures by states with respect to railroads engaged in interstate commerce have been upheld on the same principle. Chicago, Rock Island & Pacific R. Co. v. Arkansas, 219 U. S. 453; Vandalia R. Co. v. Public Service Commission of Indiana, 242 U. S. 255. The former case involved the "full crew" act of the state of Arkansas. To the contention that the act was an obstruction to, or placed a burden on, interstate commerce, the court said:

"The validity under the Constitution of the United States of such statutes is not to be questioned in a Federal court unless they are clearly inconsistent with some power

granted to the General Government or with some right secured by that instrument or unless they are purely arbitrary in their nature. The statute here involved is not in any proper sense a regulation of interstate commerce nor does it deny the equal protection of the laws. Upon its face, it must be taken as not directed against interstate commerce, but as having been enacted in aid, not in obstruction, of such commerce and for the protection of those engaged in such commerce."

Second. Now applying the principle of these cases to the facts of the case at bar, we find that the United States has not provided for the inspection of vessels less than sixty-five feet in length, either as to seaworthiness, safety of machinery, or adequacy of crews. The relators operate vessels of less than sixty-five feet in length, which are therefore not subject to inspection under Federal laws. Section 9 of our act does provide for inspection and regulation of [fol. 249] vessels in these respects. True, the provisions do not specifically refer to vessels of less than sixty-five feet in length, but they are none the less effective as to such vessels. Thus there is a field unoccupied by congressional legislation in which our act may be operative. To this extent at least, chapter 200, Laws of 1907, is valid and enforcible. Here the inquiry should stop, since we have found a field in which our act is valid and enforcible. It may be that some portions of our act are in conflict with now existing laws of the United States. If so, such portions of the act must give way. But the whole act does not therefore fall.

On this record, the court is not warranted in granting a writ of prohibition. Relators' rights may be amply protected in specific instances, if and when the director attempts to enforce provisions of the act which are in conflict with the laws of the United States.

For these reasons, I think the judgment should be affirmed.

Blake, J.

We concur in the views expressed by Judge Blake.

Main, J. Mitchell, J. Millard, C. J.

[fols. 250-293] Petitions for rehearing, governing 44 pages, filed August 4 and August 15, 1936, omitted from this print.

They were denied, and nothing more by order of September 3, 1936.

[fol. 294] IN SUPREME COURT OF WASHINGTON

[Title omitted]

ORDER DENYING PETITIONS FOR REHEARING—Filed September 3, 1936

The court having considered the petition of respondents and the petition of Kenneth Durham, as a Friend of the Court, for a rehearing herein;

It is Ordered that the petitions be and they hereby are denied.

By the Court.

William J. Millard, Chief Justice.

[File endorsement omitted.]

[fols. 295 & 296] IN SUPREME COURT OF WASHINGTON

Thurston County, No. 15804

No. 26052

THE STATE OF WASHINGTON on the Relation of Foss COMPANY, INC., a Corporation, et al., Appellants,

vs.

E. PAT KELLY, as Director of the Department of Labor and Industries of the State of Washington; Jay Olinger, as Supervisor of the Safety Division of said Department and Howell Parker, as Deputy of said Director, under the title, Marine Inspector, Respondents

JUDGMENT—September 3, 1936

This cause having been heretofore submitted to the court, upon the transcript of the record of the Superior Court of Thurston County, and upon the argument of counsel, and the Court having fully considered the same and being fully advised in the premises, it is now, on this 3rd

day of September, A. D. 1936, on motion of John S. Robinson, Esquire, of counsel for appellants, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is hereby reversed with instructions to enter judgment in conformity with the views expressed in the opinion, and that the said Foss Company, Inc., a Corporation, et al., have and recover of and from the said E. Pat Kelly, as Director of the Department of Labor and Industries of the State of Washington; Jay Olinger, as Supervisor of the Safety Division of said Department and Howell Parker as Deputy of said Director, under the title, Marine Inspector, the costs of this action taxed and allowed at Two Hundred Thirteen and 60/100 ($213.60) Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

[fol. 297] [File endorsement omitted]

[fol. 298] IN SUPREME COURT OF WASHINGTON

[Title omitted]

APPELLANTS' REPLY BRIEF—Filed March 4, 1936

It seems advisable to restate our position. We find the [fol. 299] following on page 4 of respondents' brief:

"The contention is made that the law in the first place was intended to apply only to land-locked waters."

That contention was made at the beginning of the case. We attempted to convey the idea on page 58 of our opening brief that we had abandoned it during the trial. In order to avoid any misunderstanding, we now express our complete agreement with the following statement concerning section 8 of the act in question which we quote from page 8 of respondents' brief:

"Since in this particular instance the Legislature pointed out that the rules contained in this section were not to apply to all waters under the jurisdiction of the State, but only to those under its exclusive jurisdiction, it must logically follow that all the other provisions of the Act, excepting as

otherwise provided, were to apply generally to all the waters of the State of Washington, within the State's jurisdiction."

[fol 300] We take it that it is upon the theory that all other sections were intended to apply to vessels navigating waters within the territorial jurisdiction of the state that the Director issued Exhibit No. 12 threatening the appellants with prosecution if they violated section 9 of chapter 200 prescribing the lights to be carried the validity of which section respondents insist upon in paragraph II of their answer in spite of the fact that the necessity of uniformity in the matter of lights is so plain that manifestly Congress alone can deal with it and in the face of the further fact that Congress has dealt with it from the beginning of the government and specifically prescribed the kind and character of lights to be carried on every kind of watercraft, even down to row boats (U. S. C. Title 33, sec. 176).

We take it that it is upon this same theory that all of the sections of chapter 200 except section 8 were intended [fol. 301] to apply to all waters within the territorial jurisdiction of Washington that appellants admit in their answer (paragraph II) that the Director intends to prosecute the appellants and all other vessel owners who navigate vessels (not subject to inspection by the United States Steamboat Inspector) upon waters within the territorial jurisdiction of the state of Washington, unless they

(a) Submit said vessels to inspection annually or oftener at his discretion at a cost to said owners of not less than five or more than twenty dollars for each inspection.

(b) Make such changes, repairs and improvements as said Director may require.

(c) Carry such officers as he shall license as masters, pilots and engineers.

(d) Carry such crews as he shall deem necessary to manage such vessels with safety.

[fol. 302] (e) Carry such life saving equipment as he shall require and approve.

(f) Carry such fire prevention apparatus as he shall require and approve.

(g) Keep on board at all times a copy of a license authorizing the vessel to navigate in and upon the waters of the state.

(h) Keep a copy of the first twenty-two sections of the act (twelve pages) posted in a conspicuous place.

(i) Keep the vessel's name painted on her stern in the character and colors prescribed by section 16 of the act.

(k) Comply with all orders, regulations and requirements of the Commissioner.

Do respondents seriously contend that they can lawfully make those requirements of a Canadian tug which tows a raft of logs from Vancouver, B. C., to Seattle, or a barge from Seattle to Vancouver, B. C.? Do they seriously con- [fol. 303] tend that the appellants, Shaver Transport Co. and Knappton Towboat Co., Oregon corporations, over fifty per cent of whose business is towing across the Columbia River between points in Oregon and points in Washington, must stop that operation unless they submit to these requirements, or do they admit that these foreign tugs have the right to use the navigable waters of the United States without state interference, and seek only to make it impossible for our own tugs to compete with them in our own waters by loading upon them this mass of onerous requirements and regulations? Our clients claim their constitutional right to navigate the public waters of the United States lying within the territorial limits of the state on equal terms with the tug boat operators of British Columbia and Oregon. We say "constitutional right" because every citizen of the United States has the right to navigate its public waters on equal terms. To secure such equal [fol. 304] terms to all was the purpose of conferring the exclusive power of regulation upon the federal government.

All through their case and in their briefs counsel have in a subtle way attempted to convey the impression that in some way "inland waters" are waters over which the states have a measure of control. Inland waters are those public navigable waters of the United States over which the federal government has retained full, complete and exclusive control as distinguished from those waters over which it has surrendered some measure of control by adopting the rules for their navigation agreed upon by the maritime na-

tions of the world; that is to say, The International Rules, Ch. 2, Title 33, U. S. C. At the time of the adoption of the Constitution it was recognized that navigation of the public waters of the United States must be governed by uniform rules. Chief Justice Marshall pointed out in Gib- [fol. 305] bons v. Ogden that to secure that uniformity was one of the primary objects which led to the adoption of the Constitution. As commerce by sea expanded it became clear that not even national uniformity would fully answer; that international uniformity was a necessity on the main traveled entrances, and so Congress established lines within the body of the country, outside of which rules adopted by a convention of the maritime powers should govern and inside of which (on so-called "inland waters") its own rules should govern. In establishing these boundaries of inland waters the federal government surrendered nothing to the states. It did yield something to foreign nations. The federal authority is more absolute and unqualified within these lines than outside. The federal authority is more perfect, thorough, absolute and complete over the waters of Puget Sound, that is, over inland waters of the state, than it is over the waters of Port Angeles Harbor or Neah Bay. [fol. 306] They are waters within the territorial limits of the state but they are outside the line running from New Dungeness Light to Hein Bank separating inland waters from the high seas described on page 6 of respondents' brief. Congress has, in effect, ceded them to the high seas and regulates them in concert with sixteen or seventeen other nations. But over all waters within that line, all waters connecting with the highways of the world and which are indeed part of those highways, all waters upon which the vessels of the appellants operate, the federal authority remains plenary, exclusive, unimpaired and unqualified.

We have shown in our opening brief that Congress has legislated on every point involved. Substantially all of this federal legislation was in effect when chapter 200 was enacted, including most of the provisions of the motor boat code, which were brought together, codified and repassed in 1910. It is not a question of having been superseded by [fol. 307] subsequent enactments. The law, as the present Director now attempts to construe and apply it, was never constitutional. Twenty-eight years after its enactment he

raises this difficulty by reading into the law something which is not there. The language is:

"excepting vessels which are subject to inspection under the laws of the United States."

He construes that as if it read:

"excepting vessels which are subject to inspection by the United States Steamboat Inspectors."

We concede that none of our vessels are subject to inspection by the United States Steamboat Inspectors—but we have shown that all of them are subject to inspection by navigation inspectors, and by special patrol boats of the Bureau of Navigation and Steamboat Inspection Service, by the coast guard, and by all customs officers. This is quite fully shown by the evidence and particularly by Ex- [fol. 308] hibits 6, 7, 8, 9, 10 and 11. If these are not inspections made under the laws of the United States, under what laws are they made? If the court holds that they are inspections under the laws of the United States then by its very terms no part of chapter 200 applies to appellants' vessels. If the court holds that they are not, then the law does apply and is unconstitutional from beginning to end unless, indeed, the following principles are no longer law:

The power to regulate interstate and foreign commerce includes the regulation of navigation and was one of the primary objects which led to its adoption.

Gibbons v. Ogden, 9 Wheat. 567; 6 L. Ed. 23.

"If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislatures have a right to interfere; and, as it were, by way of complement to the legislation of Congress, to [fol. 309] prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislations to act upon the subject-matter. Its silence as to what it does not do is as expressive of what its intention is at the direct provisions made by it * * * the will of Congress upon the whole

subject is as clearly established by what it had not declared, as by what it has expressed."

Southern R. Co. v. Railroad Commission, 236 U. S. 439; 59 L. Ed. 66.

The acts of Congress covering railway equipment are in volume and in particularly a mere drop in the bucket when compared to the acts of Congress regulating vessels, their equipment and life-saving apparatus. Yet the Supreme Court of the United States has said of the laws of Congress concerning railway cars and engines:

"So far as the safety of such vehicles is concerned these [fol. 310] acts operate to exclude state regulation whether consistent, complementary, additional or otherwise."

Gilvary v. Cuyhoga Valley R. Co., 292 U. S. 357; 78 L. Ed. 1123.

We cannot conceive how anyone familiar with the multitude of laws concerning the safety of vessels, of which only a part are cited in our opening brief, can contend that Congress has not dealt with this subject.

Where is there any evidence or indication that it intended to leave any part of this field open to the states and thus invite the destruction of the uniformity of the navigation laws?

Respectfully submitted, John S. Robinson, Attorney for Appellants, 602 Central Building, Seattle, Washington.

[fol. 311] IN SUPREME COURT OF WASHINGTON

[Title omitted]

NOTICE OF MOTION TO RECALL REMITTITUR—Filed October 13, 1936

To the Appellants, Foss Company, Inc., a corporation, et al., and their attorney of record, John S. Robinson:

You and each of you are hereby notified that the undersigned attorneys for the respondents in this cause will bring on for hearing the attached motion to recall the remittitur in this cause on October 23, 1936, at the hour of

10:00 a. m., of said day, or as soon thereafter as the matter may be heard by the Court, at the Temple of Justice, Olympia, Washington.

Dated this 9 day of October, 1936.

G. W. Hamilton, Attorney General; W. A. Toner, Ass't Atty. General, Daniel Baker, Of Counsel, Temple of Justice, Olympia, Washington.

Service of a copy of the original notice of motion and motion is hereby acknowledge- this 10 day of October, 1936.

John S. Robinson; Attorney for Appellants.

[File endorsement omitted.]

[fol. 312] In Supreme Court of Washington

[Title omitted]

Motion for Order Recalling Remittitur

Comes now E. Pat Kelly, as Director of the Department of Labor and Industries of the State of Washington; Jay Olinger, as Supervisor of Safety of the said Department; and Howell Parker, as Deputy of said Director, under the title, Marine Inspector, and requests this honorable Court for an order recalling the remittitur in this cause, sent down from this Court to the Superior Court for Thurston County on the 3rd day of September, 1930, for the reason that the respondents in this cause are about to seek a review of the decision of this Court by the Supreme Court of the United States, and are about to ask that the Supreme Court of the United States issue a writ of certiorari for the purpose of bringing the record of the proceedings in this Court before the U. S. Supreme Court for that purpose.

Respectfully submitted, G. W. Hamilton, Attorney General. W. A. Toner, Ass't Atty. General. Daniel Baker, Of Counsel.

[fol. 313] IN SUPREME COURT OF WASHINGTON

[Title omitted]

ORDER GRANTING MOTION TO RECALL REMITTITUR—Filed October 23, 1936

The motion to recall the remittitur in the above entitled matter having come on before the Court on the 23rd day of October, 1936, and the Court having heard Daniel Baker argue on behalf of the respondents and John S. Robinson having appeared in behalf of the appellants, and the Court being advised in the premises;

It is Ordered that the motion be granted.

By the Court:

William J. Millard, Chief Justice.

[File endorsement omitted.]

[fol. 314] IN SUPREME COURT OF WASHINGTON

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed October 13, 1936

Hon. Benj. T. Hart, Clerk of the Supreme Court of the State of Washington:

The respondents, E. Pat Kelly, as Director of the Department of Labor and Industries of the State of Washington, Jay Olinger, as Supervisor of the Safety Division of said Department, and Howell Parker, as Deputy of said Director under the title, Marine Inspector, propose to petition the Supreme Court of the United States to issue a writ of certiorari directing the Supreme Court of the State of Washington to transmit the record in this case to the Supreme Court of the United States for review on certain questions of law to be specified in said petition.

The said respondents hereby request you to prepare and certify the following documents contained in the record:

(1) The transcript on appeal to the Supreme Court, filed July 17th, 1935, containing,

[fol. 315] (2) The petition for writ of prohibition.

(3) The order of Judge D. F. Wright of the Superior Court for Thurston County granting a temporary writ of prohibition and requiring the defendants in the Court below, and the respondents in the Supreme Court, to show cause why the writ should not be made permanent, entered on December 3, 1934.

(4) The order of December 14, 1934, granting leave to Kenneth Durham to appear as amicus curiæ in the cause.

(5) The order of Judge D. F. Wright continuing the writ of prohibition in full force and effect during the pendency of the proceedings.

(6) The demurrer interposed by the defendants below, and the respondents in the Supreme Court, to the petition for the writ of prohibition.

(7) Answer of the defendants below, and the respondents in the Supreme Court, to the petition for the writ of prohibition.

(8) The memo opinion of Judge D. F. Wright denying the writ of prohibition.

(9) The order of Judge D. F. Wright dismissing the writ of prohibition, entered on March 27, 1935.

(10) The notice of appeal to the Supreme Court of the State of Washington by the appellants in the cause before the Supreme Court.

(11) The bond on appeal of the plaintiffs below, and the appellants in the Supreme Court.

(12) The certificate of the Clerk of the Superior Court for Thurston County, certifying the record to the Supreme Court of the State of Washington.

(13) The statement of facts signed and certified by the trial Judge on the 14th day of December, 1935, and filed in the Clerk's office of the Supreme Court on January 8, 1936. [fol. 316] (14) Abstract of the statement of facts, filed January 31, 1936.

(15) The opinion of the Supreme Court of the State of Washington, together with the dissenting opinion of Judge Blake, handed down July 9, 1936.

(16) The petition for rehearing filed on August 4, 1936.

(17) The order of the Supreme Court denying the petition for rehearing, entered September 3, 1936.

(18) Judgment of the Supreme Court of the State of Washington, entered September 3rd, 1936.

(19) The original exhibits to the Supreme Court, separate and not as part of the certified copy of the record.

(20) Appellants' reply brief to the respondents' brief.

G. W. Hamilton, Atty. General; W. A. Toner, Ass't Atty. General; Daniel Baker, of Counsel, Temple of Justice, Olympia, Washington.

Copy Received 10-10-36. John S. Robinson, Atty. for Appellants.

[File endorsement omitted.]

[fol. 317] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

[Title omitted]

SUPPLEMENTAL PRÆCIPE FOR RECORD—Filed October 23, 1936

Hon. Benj. T. Hart, Clerk of the Supreme Court of the State of Washington:

You are requested to certify to the following documents in addition to those requested to be certified in the original præcipe:

(1) The motion to recall the remittitur in the above entitled cause.

(2) Order, dated October —, 1936, recalling remittitur.

G. W. Hamilton, Attorney General. W. A. Toner, Ass't Attorney General. Daniel Baker, of Counsel.

[fol. 318] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 162] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 18, 1937

The petition herein for a writ of certiorari to the Supreme Court of the State of Washington is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petion shall be treated as though filed in response to such writ.